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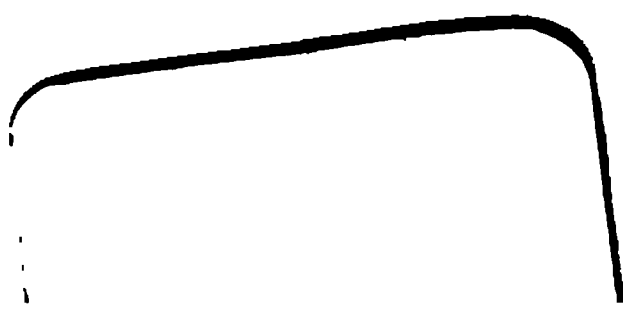
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THE
AMERICAN REPORTS

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES

WITH

NOTES AND REFERENCES

BY

IRVING BROWNE.

VOL. XXX.

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CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

MONTGOMERY v. SCOTT.

(9 S. C. 20.)

*Fraud—action by mortgagor to avoid mortgage fraudulently obtained—
negligence.*

In an action by a mortgagor for equitable relief from a bond and mortgage which she had been fraudulently induced to execute, against a *bona fide* holder for value, the plaintiff must not only show that she was induced to execute the instruments by the false and fraudulent representations of such third party, but also that the execution was without negligence on her part, and this, although she was old, infirm and illiterate.

ACTION to set aside a bond and mortgage. The opinion states the facts. The plaintiff had judgment below.

Rhett, for defendants.

Marshall, contra.

McIVER, A. J. The object of this action is to have a bond and mortgage of real estate, which had been signed in due form by the plaintiff, in the presence of two subscribing witnesses, in favor of the defendants, Scott & Son, cancelled, upon the ground that the plaintiff had been induced to sign the same by the false and fraudulent representations of the defendant Houston that the paper she was signing was only a recognizance for his appearance at the

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Court of Sessions to answer to an indictment to be preferred against him, whereas, in fact, the bond was the joint and several obligation of Houston and the plaintiff to pay Scott & Son \$1,000 one year from its date, secured by a mortgage of real estate, the property of the plaintiff, signed by the plaintiff alone. The defendants, Scott & Son, in their answer (the other defendant, Houston, having made default), deny all knowledge or suspicion of the fraud alleged, and say that, having received the bond and mortgage for full consideration and without notice or suspicion of the fraud alleged, the plaintiff has no cause of action against them, but that, if she has suffered loss, it is the result of her own misplaced confidence in the defendant Houston, and to him alone must she look for redress. The issues of law and of fact having been referred to a referee, he made his report, wherein he finds as matters of fact :

1. That the bond and mortgage were executed by the plaintiff, but that she was induced to do so by the false and fraudulent representations of Houston that they were nothing but a bond for his appearance at court.

2. That upon the execution of these papers they passed into the hands of Houston, who very soon afterward delivered them to Scott & Son "to secure a debt of some \$1,600 which he owed them for so much money by them lent and advanced to him ; that upon receiving from the said C. J. Houston the said bond and mortgage deed, the defendants, Edwin J. Scott & Son, delivered and returned to said C. J. Houston other securities for his said debt which he had previously deposited with them, amounting to a large sum, and that when the said bond and mortgage deed were so delivered to them by the said C. J. Houston, they, the said Edwin J. Scott & Son, had no knowledge, notice or suspicion of the said fraudulent means by which said C. J. Houston had procured the said bond and mortgage from the said plaintiff."

And he finds as matter of law that the bond, so far as the liability of the plaintiff thereon is concerned, and the mortgage, are invalid, and that she is entitled to have the same delivered up and cancelled, and that the costs should be paid by defendant Houston.

To this report exceptions were filed, both by the plaintiff and by the defendants, Scott & Son, which, being overruled by the circuit judge, are again presented here by way of appeal. The defendants, Scott & Son, take several exceptions, as well to the findings of fact as to the conclusions of law, which, from the view we take

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of this case, it will be unnecessary to consider in detail. For while this is a case in which it would be entirely competent for this court to review the findings of fact as well as the conclusions of law of the court below, and while such review might well be invited by the conflict in the testimony, which seems to have been so great that the able and experienced referee could only reach his conclusions after much hesitation, prompting him to a suggestion that perhaps the safer and more satisfactory course would have been to have submitted the issue of fraud to a jury, in which suggestion we fully concur, though, of course, we are not to be understood as interfering with the right of parties to choose their own mode of trial by ordering such a trial, yet as the case must go back for a new trial upon another ground hereafter to be noticed, we do not propose to prejudice the interest of either party upon such new trial by giving expression to any views which we might take of the testimony. The only question, therefore, which we propose to consider is that raised by one of the exceptions taken by the defendants, Scott & Son, namely, whether it is not necessary that it should be made to appear not merely that the plaintiff was induced by the fraud of a third person (Houston) to sign the bond and mortgage, but that, *without negligence* on her part, she was so induced to sign these papers, before she can ask the court for the relief demanded against the holders, who were innocent of any knowledge of such fraud at the time they, for valuable consideration, took such bond and mortgage. It will be observed that this is a case in which the plaintiff seeks relief, which was formerly obtainable alone in a court of equity, and the rule of that court, which we consider still binding on this court in the adjudication of a case to which it is appropriate, notwithstanding the fact that the court of equity has been abolished, was that "a party coming into a court of equity is bound to show that his title to relief is unmixed with any gross misconduct or *negligence* of himself or his agents."—Story's Eq., § 105. Chief Justice MARSHALL, also, in *Marine Insurance Company v. Hodgson*, 7 Cr. 332, seems to have recognized the correctness of this rule. In speaking of the power of a court of equity to restrain parties from availing themselves of the benefit of judgments obtained at law, he uses this language: "It may safely be said that any fact which clearly proves it to be against conscience to execute a judgment * * * of which he might have availed himself at law, but was prevented by fraud or

accident, *unmixed with any fault or negligence in himself or his agents*, will justify an application to a court of chancery." See, also, *Penny v. Martin*, 4 Johns. Ch. 566.

Again, Story, in section 290, *a*, in speaking of a purchaser who asks to be relieved from a purchase made on the ground of misrepresentations by the vendor, says: "If he does not avail himself of the knowledge or means of knowledge open to himself or his agents, he cannot be heard to say that he was deceived by the vendor's misrepresentations. * * * It is his own folly and *laches* not to use the means of knowledge within his reach, and he may properly impute any loss or injury in such a case to his own negligence and indiscretion. Courts of equity do not sit for the purpose of relieving parties, under ordinary circumstances, who refuse to exercise a reasonable diligence or discretion." This rule, which has received the sanction of this eminent text writer, as well as of courts of the highest authority, is but the expression of a natural feeling of equity which would prompt any just man to say that where one comes into a court of equity and asks, against an innocent party, the interposition of its extraordinary powers, to protect him from danger or loss occasioned by the fraud of a third party, he ought to be required to show that he has in no way, either by his misconduct or negligence, contributed to the perpetration of the fraud from the consequences of which he seeks to be relieved at the expense of such innocent party. An examination of the decided cases, which seem to be but few in number, will show that this rule has been applied even by courts of law in cases analogous to the one now under consideration. In *Foster v. McKinnon*, 38 L. J. R. (N. S.) 310, which may be regarded as the leading case, the action was by the indorsee, a holder for value before maturity without notice of any fraud against the indorser of a bill of exchange, and the defense set up was that the indorsement had been obtained by fraud, the party obtaining it representing to the defendant that the paper he was signing was nothing but a guaranty. The jury were instructed that if the defendant signed not knowing that it was an indorsement, but being induced by the fraudulent and false representations made to him to believe that it was a mere guaranty, *and if the defendant was not guilty of any negligence in so signing the paper*, then the defendant would be entitled to the verdict. On a rule for a new trial this instruction was indorsed as correct, and the court, per BYLES, J., in delivering its opinion, uses

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this language : “It seems plain, on principle and authority, that if a blind man or a man who cannot read, or who for some reason (*not implying negligence*) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterward signs, then, at least, *if there be no negligence*, the signature so obtained is of no force.” And after citing *Thoroughgood’s* case, 2 Co. Rep. 9 b, and other cases, says : “Accordingly it has been recently decided in the Exchequer Chamber that if a deed be delivered and a blank left therein be afterward improperly filled up (*at least if this be done without the grantor’s negligence*), it is not the deed of the grantor.” *Swan v. The North British Australasian Co.*, 2 Hurlst. & C., 175; s. c., 32 L. J. R. 573. A new trial was, however, granted upon the ground that the verdict was against the evidence. And although it is not so stated, the facts of the case would seem to imply that the court was not satisfied with the verdict upon the question of negligence, and this is the inference drawn by the court in the case of *Chapman v. Rose*, hereinafter cited. In the case of *Douglass v. Matting*, 26 Iowa, 498 ; s. c., 4 Am. Rep. 238, the action was on a negotiable note by an innocent holder before maturity for value, and the defense was that the maker had been induced to sign under the false and fraudulent representation that the paper was of a different character from what it proved to be. The court held the maker liable, saying : “It would be manifestly unjust to permit the maker, while admitting the genuineness of his signature, to defeat the note on the ground, that through his own culpable carelessness while dealing with a stranger, he signed the instrument without reading it or attempting to ascertain its true contents. * * *

The maker had it in his power to protect himself from the fraud, but failed to do so. When the consequences of this act are about to be visited upon him he seeks to make another bear it, on the ground that he was defrauded through his own gross negligence.”

Garrard v. Hadden, 67 Penn. St. 82; s. c., 5 Am. Rep. 412, was also an action on a negotiable note, by an innocent holder, before maturity, and the defense was that the note, which was on a printed form, had been altered by the insertion of the words “and fifty” in the blank space left after the word “hundred.” The court held the maker liable on the ground of his negligence in not taking

some precaution, as for example, by scoring the blank space with his pen, by which such alteration could have been prevented or detected. The court places its decision upon the maxim cited from Story, § 387 : "That where one of two innocent persons must suffer, he shall suffer who, by his own acts, occasioned the confidence and the loss," and from the doctrine cited from the same author, as "but an elaboration of a great principle of justice, that if one, by his own acts, or silence or negligence, misleads another, or in any manner affects a transaction, whereby an innocent person suffers a loss, the blamable party must bear it." In the case of *Chapman v. Rose*, 56 N. Y. 137 ; s. c., 15 Am. Rep. 401, the action was on a negotiable note by an innocent holder before maturity, and the defense was that defendant's signature had been obtained by the false representations of the payee that the paper was an order for a hay fork and two pulleys, instead of a promissory note, as it proved to be. It was held that the maker, if guilty of negligence in signing the paper, would be liable, notwithstanding the fact that he was induced by the payee to believe that the paper signed was a mere order of the kind above stated and not a promissory note. The court reviews the authorities, and rests its decision, not upon any doctrine peculiarly applicable to negotiable paper, but upon a principle stated in the following language: "He who, by his carelessness or undue confidence, has enabled another to obtain the money of an innocent person, shall answer the loss. If it be objected that there must be a duty of care in order to found an allegation of negligence upon the neglect of it, it must be answered that every man is bound to know that he may be deceived in respect to the contents of a paper which he signs without reading. When he signs an obligation without ascertaining its character and extent, which he has the means to do, upon the representations of another, he puts confidence in that person, and if injury ensues to an innocent third person, by reason of that confidence, his act is the means of the injury, and he ought to answer to it." In the *Citizens' National Bank v. Smith*, 55 N. H. 593, the subject is fully discussed, and after a review of the authorities, the conclusion is reached that, to sustain such a defense, it is necessary to show that the maker was not guilty of negligence ; and this doctrine is based upon the broad general principle that "whenever one of two innocent persons must suffer by the acts of a third, he who has enabled

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such third person to occasion the loss must sustain it," and not upon any doctrines peculiar to negotiable notes.

The case of *Brown v. Reed*, 79 Penn. St. 370 ; s. c., 21 Am. Rep. 75, is somewhat peculiar in this respect: that the paper in question was not, in its inception, in the form of a negotiable note, but was, when it was signed, nothing but an agreement in writing, by which the maker bound himself to pay to the payee or bearer \$50 whenever he should sell \$250 worth of hay and harvest grinders, and was signed by Brown, "agent for hay and harvest grinders." But by an ingenious device, the paper was so written, that by cutting it into two pieces, one of them, to all appearances, would be a perfect promissory note, with the name of Brown signed to it, without the addition of the words "agent for hay and harvest grinders;" and upon this piece of paper the action was brought by Reed, an innocent holder, for value, before maturity. The defense was that no such paper had ever been signed by the maker, and yet the court held that negligence of the maker, which was a question for the jury to pass upon, would preclude such a defense. Now, while it is true that in the most of these cases the question arose under actions brought on negotiable notes by innocent holders for value before maturity, it is equally true, as we have seen, that the decisions are not based upon any doctrines peculiar to negotiable paper; for although the judges have, in some of the cases, fortified their conclusions by suggesting the tendency that a contrary rule would have to destroy confidence in commercial paper, such suggestions are merely additional reasons for, and do not constitute the basis upon which, such decisions rest. This is obvious from the consideration that the very gist of such a defense is that the paper sued upon is *not* a negotiable paper; for while it is so in form, yet the fact that the signer was deceived into the act of signing, that "his mind never went with his act," that "he never intended to sign, and therefore, in contemplation of law, never did sign, the contract to which his name is appended," it is argued, deprives it of that character and demonstrates that it is *not* his note. This defense must necessarily be placed upon this ground, as it cannot possibly stand upon any other; for the very moment it is conceded that the paper in question is the negotiable note of the maker, it immediately becomes subject to the incidents which belong to such a paper in the hands of an innocent holder for value before maturity. How, then, a defense which necessarily

rests upon the theory that the paper in question is *not* a negotiable paper, can be said to derive its efficacy from doctrines peculiar to negotiable paper, it is difficult to perceive.

This seems to be the view taken by DIXON, C. J., in *Walker v. Egbert*, 29 Wis. 194; s. c., 9 Am. Rep. 548, where, in discussing this question, he uses this language: "The inquiry in such cases goes back of all questions of negotiability, or of the transfer of the supposed paper to a purchaser, for value, before maturity and without notice. It challenges the origin or existence of the paper itself; and the proposition is to show that it is not in law or in fact what it purports to be, namely, the promissory note of the supposed maker. For the purpose of setting on foot or pursuing this inquiry, it is immaterial that the supposed instrument is negotiable in form, or that it may have passed to the hands of a *bona fide* holder for value. Negotiability in such cases presupposes the existence of the instrument as having been made by the party whose name is subscribed; for until it has been so made, and has such actual legal existence, it is absurd to talk about a negotiation or transfer, or *bona fide* holder of it, within the meaning of the law-merchant. That which, in contemplation of law, never existed as a negotiable instrument, cannot be held to be such; and to say that it is and has the qualities of negotiability because it assumes the form of that kind of paper, and thus to shut out all inquiry into its existence, or whether it is really and truly what it purports to be, is *petitio principii*—begging the question altogether.

* * For the purposes of this first inquiry which must be always open when the objection is raised, it is immaterial what may be the nature of the supposed instrument, whether negotiable or not, or whether transferred or negotiated, or to whom or in what manner, or for what consideration or value paid by the holder. * * * In these and all like cases no additional validity is given to the instruments by putting them in the form of negotiable paper." While it may be very true, as a general rule, that a party ought not to be bound by a mere mechanical act which his mind did not accompany, because such act is not, in truth, the act of the party, it is equally true that such party may, by his acts or omissions, be estopped from denying that he did such act; for we know that it not unfrequently happens that parties, by reason of some act or omission on their part, debar themselves from taking positions which, abstractly considered, are incontestably correct, both in law and in

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fact. Now, in this case, the plaintiff knew that she was signing some kind of written obligation, and if she, through carelessness or negligence, signed a paper of a different character from that which she intended, and that paper has been received by an innocent third person, for value, she ought not to be allowed, when called upon to respond to the obligations imposed by terms of the paper, to say: "It is true I performed the mechanical act of signing the paper, but my mind did not accompany the act, and therefore, it is not in reality my act, and I am not bound by it," unless she can at the same time say that the act, which she now disavows, was brought about solely by the fraud of a third person, and was in no way occasioned by or resulted from any fault or negligence on her part; still less ought she to be allowed to say this when she invokes the active aid of the court, by the exercise of its extraordinary powers, to relieve her from the consequences of such an act at the expense of an innocent third person, unless she can show that these consequences are in no way attributable to any fault or negligence on her part. This would be allowing a party in a court of equity, in violation of every principle governing such a court, to trace his title to relief through his own misconduct or negligence. There are other cases in which the question of negligence has been recognized as an important and necessary inquiry. *Putnam v. Sullivan*, 4 Mass. 54; s. c., 3 Am. Dec. 206; *Gibbs v. Linabury*, 22 Mich. 479; s. c., 7 Am. Rep. 675; *Walker v. Egbert*, 29 Wis. 194; s. c., 9 Am. Rep. 548; and even *Taylor v. Atchison*, 54 Ill. 196; s. c., 5 Am. Rep. 118, which, in some of the cases, is cited as an authority to the contrary. This case, however, can have but little influence in determining the question, as it is rested mainly upon the terms of a statute of that State, and in it there is not a single authority cited. We may also add the case of *Burson v. Huntington*, 21 Mich. 417; s. c., 4 Am. Rep. 497, in which the question was whether, in an action by an innocent holder, for value before maturity, a person could be made liable who had signed but had not delivered a negotiable note, it having been taken from the table by the payee, where the parties were sitting engaged in a negotiation which had not been completed, during a temporary absence of the maker. The court, in discussing this case, after declining to apply to it the rule that where one of two innocent parties must suffer, the loss must fall upon him by whose act or omission it was caused, upon the ground that such rule "is mainly confined to cases where the party

who is made to suffer the loss has reposed a confidence in the third person whose acts have occasioned the loss," uses this language: "We do not assert that the general rule we are discussing (that where one of two innocent parties must suffer, etc.) must be confined exclusively to cases where a confidence has been placed in some other person (in reference to delivery) and abused. There may be cases where the culpable negligence or recklessness of the maker in allowing an undelivered note to get into circulation might justly estop him from setting up non-delivery."

The decision of the court below is based upon the authority of *Thoroughgood's* case, 2 Coke, 9 b, and the case of *Schuylkill County v. Copley*, 67 Penn. St. 386; s. c., 5 Am. Rep. 441; but even *Thoroughgood's* case seems to recognize the question of negligence as important to be considered in cases of this kind; for in the second resolution we read: "That such layman, not learned, is not bound to deliver the deed if there be not one present which can read the deed to him in such language that he who should make the deed may understand it; and that is the reason that if it be read to him in other words than are contained in the writing, it shall not bind the party who delivereth it, for it is at the peril of the party to whom the writing is made that the true effect and purport of the writing be declared, *if it be required, but if the party who should deliver the deed doth not require it, he shall be bound by the deed, although it be penned against his meaning.*" Now, does not this necessarily imply that if the grantor is guilty of negligence he shall be bound? For the doctrine announced in this case rests upon the idea, that as the mind of the party did not accompany the merely physical act of signing, it is not in reality his act, and therefore, he is not bound; and yet in this second resolution two conditions of things are presented, in neither of which does the mind of the grantor go with the physical act of signing — one where the deed, at the request of the grantor, an illiterate person, is read wrongly; in which case the grantor is *not* bound. Why? Because he has used proper precautions to inform himself of what he was signing; the other where the grantor omits to require the reading of the deed; in which case he is bound by the deed, "although it be penned against his meaning." Why? Because he has omitted to use proper precautions to protect himself; that he has been guilty of negligence. In the case of *Schuylkill County v. Copley*, it was held that where an illiterate person signed a paper which was falsely

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represented to be a petition, but which was really a bond, he was not liable thereon, although the obligee was not aware of the fraud until after the bond had been accepted. The only controversy in this case, not mentioning a question of evidence irrelevant to the matter we are considering, was whether the obligor would be liable unless it was shown that the obligee was aware of the fraud before accepting the bond, and this is the only point that can be said to have been decided. No question of negligence was raised or considered in the case; and therefore this case cannot be regarded as any authority upon the question now under consideration by this court. So, too, the case of *Jackson v. Hayner*, 12 Johns. 469, cited to sustain the decision below, cannot be regarded as authority upon the question we are considering, for there the action was by a purchaser at sheriff's sale, to which the doctrine of *caveat emptor* applies, the purchaser only getting whatever title the defendant in execution may have had, and of course, therefore, if the assignment of the lease under which such defendant held was void for fraud, the purchaser, though innocent of any participation in or knowledge of such fraud, bought nothing. The cases of *Green v. North Buffalo*, 6 P. F. Smith, 110, and *Gourdin v. Read*, 8 Rich. 230, which were also cited in support of the circuit judgment, do not, in our opinion, conflict with the view we take of this case; for in the former the abstract proposition, taken from the first resolution in *Thoroughgood's case*, is announced as law. But the court did not have occasion to consider, and did not decide, the point which is now under consideration; and in the latter the only point decided is, that if a surety on a bond who, by parol, has authorized his principal to fill up blanks in the bond with the date and name of the obligee, has, before such blanks are filled, revoked such authority, he would not be liable to the obligee, whose name had been subsequently inserted, even though such obligee had no notice of such revocation when he took the bond; and hence it cannot affect the question now before the court.

The case of *Briggs v. Ewart*, 51 Mo. 245; s. c., 11 Am. Rep. 445, is also relied on as authority for the proposition that negligence of the maker cannot affect the inquiry; but an examination of that case will show that no such point was there decided, and on the contrary, the instruction asked for, which, on exception, was indorsed, recognized the qualification of negligence, although the judge who delivered the opinion of the court did seem to ignore

the question of negligence as an unnecessary and unimportant inquiry in a case of this kind. But the same court, in the subsequent case of *Shirts v. Overjohn*, 60 Mo. 305, decided that "where it appears that the party sought to be charged intended to bind himself by some obligation in writing, and voluntarily signed his name to what he supposed to be the obligation he intended to execute, having full and unrestricted means of ascertaining for himself the true character of such instrument before signing the same, but by his failure to inform himself of its contents, or by relying upon the representations of another as to the contents of the instrument presented for his signature, signed and delivered a negotiable note in lieu of the instrument intended to be signed, he cannot be heard to impeach its validity in the hands of a *bona fide* holder." In this case the court, with a view, doubtless, to correct any misapprehension which the language used by the judge who delivered the opinion in *Briggs v. Ewart*, might give rise to, says: "In the cases of *Briggs v. Ewart*, 51 Mo. 245, and *Martin v. Smyler*, 55 id. 577, which were similar to the case at bar, the instructions which were brought under review, and which received the approval of this court, declared the law to be that a person signing a promissory note could not be held liable as maker by a *bona fide* holder, if his signature was obtained *without his fault or negligence*, on the fraudulent representations of the payee that the paper offered for signature was not a note, and that the party sought to be charged did not know it was a note, and did not intend to sign a note. Some observations, however, of the judge who delivered the opinion of the court in the case of *Briggs v. Ewart*, seem to reject the qualification of negligence and to announce the broad doctrine, that to be binding, the instrument must be executed as and for the paper it purports to be, and if the party to be charged did not intend to make a promissory note he cannot be held bound even in favor of a *bona fide* holder for value. These observations and the subsequent case of *Corby v. Weddle*, 57 Mo. 452, in so far as it is based upon them, are disapproved."

This question of negligence seems to have been wholly ignored, both by the referee and the Circuit judge, although distinctly made and insisted upon by the defendants, Scott & Son; for although it is stated in the brief submitted by the counsel for the plaintiff that the referee found "that the plaintiff was guilty of no negligence," we have been utterly unable, after a most careful ex-

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amination of the report, to discover any such finding, or even any evidence that the referee considered the question at all, and we must therefore conclude that this statement in the brief of the plaintiff's counsel is an error, doubtless altogether inadvertent.

Holding, then, as we do, that the question whether the plaintiff was guilty of negligence in allowing herself to be imposed upon by Houston, if in fact she was so imposed upon, is not only an important but an essential inquiry, and this question not having been passed upon by the court below, the case must go back for a new trial. It is therefore unnecessary at this time, to consider the question of costs raised by the plaintiff's exception.

A new trial is ordered.

WILLARD, C. J., concurred.

BAMBERG V. SOUTH CAROLINA RAILROAD CO.

(9 S. C. 61.)

Carrier — of live animals — liability of.

The common-law liability of a common carrier for the delivery of live animals is the same as that for the delivery of inanimate things, and he is not liable for injuries caused by the peculiar character and propensities of the animals.*

ACTION for injuries sustained by a mare while being transported by defendant. The plaintiff had judgment below. The opinion states the facts.

Skinner, for appellant.

Dibble & Izlar, contra.

McIVER, A. J. This was an action to recover damages from the defendant as a common carrier for injuries sustained by a horse, the property of the plaintiff, in its transportation from Augusta, Ga., by the defendant's cars, to Bamberg, S. C. The horse in question, with a number of others, forty-two in all, was forwarded from Augusta by G. W. Conway, the agent of the plaintiff, to the

* See, to same effect, *Mynard v. Syracuse, etc., R. R. Co.* (71 N. Y. 180), 27 Am. Rep. 28.

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plaintiff, who is a dealer in stock at Bamberg. A. W. Lewis, an assistant agent of the defendant at Augusta, was charged with the duty of superintending the loading of cars with live stock, being furnished with hands for that purpose. It appeared from a paper offered in evidence and headed "Rates of transportation on the South Carolina Railroad," that special rates for the transportation of live stock from Augusta to Bamberg had been established, whereby the charge for the transportation of a single horse, etc., was nine dollars; ten to twenty horses, each three dollars and a half; for a "car load of any of the above stock, passenger to accompany each car of stock, but one kind of stock to be put in each car, and load not to exceed 16,000 pounds, thirty dollars." This paper also contained sundry rules and stipulations, amongst which are the following: "The company will not be responsible for any damage occasioned by delays from storms, nor will they guarantee special despatch in the transportation; nor will they hold themselves liable for damages, or as common carriers, for any article, after its arrival at its place of destination and unloaded in the company's warehouses or depots." Conway, in reply to the question as to what arrangements he made with the railroad officials for the transportation of these horses, said "that he did, as usual, engage a car for their shipment," while Lewis testified that "G. W. Conway applied to him for two cars for shipment of live stock to Bamberg. The two cars were chartered to Conway at thirty dollars each and placed at his disposal for loading." The plaintiff, however, testified that "I have never, at any time, made any special arrangement with defendant or its agents in regard to the transportation of my stock. When I have had stock to ship I have always notified defendant's agents and they have the cars placed in position to receive my stock, and I have always paid the regular rates of freight. I never have chartered a car from defendant; my stock shipped on their road have always been shipped in the manner just stated, and as I have before testified, the company has always paid me for stock injured in transportation until this instance." The horse was found to be injured when taken from the cars at Bamberg, but there was no evidence showing the cause of the injury complained of. The defendant requested the Circuit judge to charge the jury as follows:

"1. That the plaintiff having chartered the car in question from defendant upon a fair view of same, the liability of defendant, as a

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common carrier, does not attach, nor can the defendant be held liable for any amount in this action.

2. That in this instance the defendant was only liable for the proper transportation of the cars from Augusta to Bamberg.

3. That the facts disprove negligence on the part of the defendant.

4. That the defendant is not liable at common law as a carrier of live stock.

5. That if they find for the plaintiff they must deduct the freight of the two cars of stock, forty-two head, at three dollars and a half per head, from the amount so found." ♦

[Omitting minor questions.]

This brings us to the consideration of the question raised by the fourth request : whether the defendant is liable at common law as a carrier of live stock, or, to state the question more precisely, whether a railroad company, in the transportation of live stock, is not exempt from the operation of the common-law rule by which the liability of a common carrier is tested. This question, so far as we are informed, has never before been distinctly raised in this State, though it has received consideration at the hands of the courts of other States in this country, as well as in England, and as we shall see, no uniform result has been reached. It is true that there are many cases in which damages have been recovered from railroad companies and from ferrymen, who have been held to be common carriers (*Cook v. Gourdin*, 2 N. & McC. 19 ; *Cohen v. Hames*, 1 McC. 439, and *Wilson v. Hamilton*, 4 Ohio St. 722), for injuries done to live stock in its transportation, under circumstances which indicated clearly that the courts regarded carriers of live stock as subject to the same common-law rule which governs in actions for damages to inanimate property ; yet the cases in which the precise question has been distinctly raised and decided are comparatively few. There is also another class of cases in which the question has been complicated with, or made to depend upon, inquiries as to whether the common-law liability of a carrier could be, or had been, limited by printed notices appended to bills of lading, or by express contract. Yet the exceptions taken do not present this case under any such aspect, and indeed, could not well do so, as the only evidence offered which in any respect tended to show that there was any design on the part of the defendant to limit its liability was that contained in the "rules and stipulations"

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embraced in the printed rates, and these only asserted exemption from liability for damage occasioned by delays from storms, or from the want of special despatch in the transportation, or for damages to any article after its arrival at its place of destination and delivery in the company's warehouses or depots ; and as there was no pretense that the damage complained of in this case arose from delay by reason of a storm or from the want of special despatch, or that it occurred after the arrival of the property alleged to have been damaged at its point of destination and after it was unloaded in the warehouses or depots of the company, there was no room for such an element in the case, and hence there is no necessity to consider the further question as to whether the contract, having been made in Georgia, could be controlled by our act of 1864 forbidding railroad companies from limiting their common-law liability by notice or by special contract. There are, however, two cases which distinctly decide that railroad companies are not liable as common carriers in the transportation of live stock. *The Michigan Southern and Northern Indiana Railroad Company v. McDonough*, 21 Mich. 165 ; s. c., 4 Am. Rep. 466 ; and the *Lake Shore and Michigan Southern Railroad Company v. Perkins*, 25 Mich. 329 ; s. c., 12 Am. Rep. 275. While the reverse is held in the following cases : *Smith v. New Haven and Northampton Railroad Company*, 12 Allen, 531 ; *Kansas Pacific Railroad Company v. Reynolds*, 8 Kans. 623 ; *Kansas Pacific Railroad Company v. Nichols*, 9 id. 235 ; s. c., 12 Am. Rep. 494 ; *Clarke v. Rochester and Syracuse Railroad Company*, 14 N. Y. 570 ; to which may be added the case of *The Great Western Railway Company v. Blower*, 2 Eng. Rep. 700.

In the case of the *Michigan Southern and Northern Indiana Railroad Company v. McDonough*, the conclusion reached that a railroad company is not liable as a common carrier in the transportation of live animals is sought to be sustained by argument as well as by authority ; but in our judgment the cases cited do not sustain such conclusion, although some remarks of some of the judges, in those cases, may justly be regarded as pointing in that direction. Nor is the argument any more satisfactory. The learned judge who delivered the opinion of the court says : " For the purposes of this case, it may be assumed that this company, by their charter and act of consolidation, are required to take upon themselves the business of common carriers, and to transport, as such, all such property

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tendered to them, for that purpose, as was usually transported by railroads, as common carriers, at the date of the charter of the Michigan Southern Railroad Company, in 1846, and any other kind of property which, in the progress of invention and business, might be tendered for such carriage, which should not from its nature impose risks of a different character, or require an essentially different mode of managing their road, or the incurring of extra expenses on account of the different character of such new kinds of property. But the transportation of cattle and live stock, by common carriers, by land, was unknown to the common law when the duties and responsibilities of common carriers were fixed, making them insurers against all losses and injuries not arising from the act of God or of the public enemies. These responsibilities and duties were fixed with reference to kinds of property involving in their transportation much fewer risks and of quite a different kind from those which are incident to the transportation of live stock by railroad." And after pointing out the manner in which the risks would be increased, and the necessity for the railroad company to incur additional expense to secure the safe transportation of such property, he concludes that the common-law rule of liability cannot be applied to the transportation of live animals. The fault of this argument seems to us to consist in assuming that the common-law rule was framed with reference to, and was applicable only to, the transportation of such articles as common carriers were in the habit of transporting at the time such rule became a part of the law, whereas we think the true view is that this rule grew out of the *nature of the business*, and was based upon considerations of public policy, by which it was thought necessary that such business should be governed. The supposed necessity for the rule grew out of the fact that the carrier was intrusted with the exclusive custody and control of the goods, it did not matter of what kind or nature, of another, for a special purpose, to wit: to be transported from one place to another. Whether a person was a common carrier or not depended solely upon whether, by his acts or declarations, he held himself out to the world as such, and not upon the kind of property that he carried. One definition, in the elementary books, of a common carrier will show that his character as such did not depend upon the kind of goods which he carried, but solely upon whether he held himself out to the world as a person who was engaged in carrying property of others; not property of a particular kind, but

of any kind, from place to place for hire. Take the definition given by Kent: "Common carriers are those persons who undertake to carry goods generally, and for all people indifferently, for hire, and with or without a special agreement as to price." Or that given by Story in his work on Bailments: "One who undertakes, for hire or reward, to transport the goods of such as choose to employ him, from place to place." We find here no intimation whatever that the question as to whether a person occupies the position of a common carrier depends upon the kinds of goods which he carries, but solely upon whether he is engaged in the business of carrying goods generally from one place to another for hire. Then, the moment one's character as a common carrier becomes established, the rule applicable to such business must necessarily be applied. It seems to us that the argument used in the Michigan case, carried to its legitimate results, would leave very little scope for the operation of the common-law rule. For in this age, when by the progress of invention and discovery and the development of the natural resources of the country, many new and different kinds of articles are being constantly added to the large mass requiring transportation, such a limitation of the common-law rule as that contended for would open an endless source of litigation by practically abrogating the rule, which the wisdom of ages has found to be the most suitable, for determining the liability of persons engaged in the transportation of the goods of others from place to place for hire. For as each new article was introduced, it would become necessary to inquire whether its nature was such as to increase the risks incurred in its transportation. That the common-law rule had its origin in considerations of public policy springing from the nature of the business in which the carrier was engaged, unaffected by the nature of the articles handled in the conduct of such business, is apparent from the reasons given in defense of the rule against what has been supposed by some to be its undue harshness. See Story on Bailments § 490; *Smyrl v. Nolon*, 2 Bail. 422. The case of the *Lake Shore and Michigan Southern Railroad Company v. Perkins*, having been decided in accordance with and in fact based upon *McDonough's case*, *supra*, which we have just been considering, no extended examination of it is necessary.

It is to be observed that the decisions in these two cases are in apparent conflict with the decision in another Michigan case — *The Great Western Railway Company v. Hawkins*, 18 Mich. 427; and

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although an effort is made in both cases to reconcile or account for such apparent conflict, yet we must confess that the effort does not strike us as successful in either case. These Michigan decisions may possibly be accounted for by what is said of them by VALENTINE, J., in *The Kansas Pacific Railway Company v. Nichols*, 9 Kans. 235 ; s. c., 12 Am. Rep. 496 : " In Michigan, since April, 1870, railroads have not been public purposes or public uses in the sense that they are such in other States of the Union. In that State they are strictly private purposes or uses. *People v. Salem*, 20 Mich. 452 ; s. c., 4 Am. Rep. 400. The Supreme Court of that State says that ' they (railroad companies) are public agents, in the same sense that the proprietors of many other kinds of private business are, and not in any other or different sense. Our policy in that respect,' says the court, ' has changed. Railroads are no longer public works, but are private property.' Railroads in Michigan seem from that decision to be such private corporations as are described in the case of *Leavenworth Co. v. Miller*, 7 Kans. 524. If they are such private corporations as are there described, of course they have a right to be common carriers of just such property as they choose — no more and no less. This is not so in Kansas. The railroads of Kansas are organized upon a different basis. In Kansas they are endowed with a *quasi* public as well as private character. In Kansas they are so far public that the sovereign power of eminent domain may be exercised for their benefit, and they are so far public that other public aid may be extended to them." What is here said of railroads in Kansas is in many respects true of railroads in South Carolina. We are not inclined, therefore, to follow the decisions in these two cases from Michigan, but, on the contrary, we think the rule is correctly stated in *Smith v. New Haven and Northampton Railroad Company*, 12 Allen (Mass.) 531, and is well supported by reason as well as by authority. The rule as there stated is this: " The common-law liability of a carrier for the delivery of live animals is the same as that for the delivery of merchandise. To this general rule there is an *apparent* exception, supported by authority which we adopt, that the liability of the carrier does not extend to injuries caused by the peculiar character and propensities of the animals to themselves or each other." But as the learned judge proceeds to show, this exception is more *apparent* than *real*, for while the common-law rule, as ordinarily stated, is that the carrier is liable for all losses except those

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occasioned by the act of God or of the public enemy, yet the principle of this exception, or more properly speaking, addition, to the common-law rule, as usually stated, has always been recognized as a part of such rule. For example: The carrier was not liable under the common-law rule for the natural and ordinary decay of fruits or vegetables, for the evaporation of liquids, or for any other damage caused by the inherent infirmity of the article carried. So, too, the carrier would not be liable under that rule for damages occasioned by the inherent character or propensities of the animals. Story on Bail., §§ 492 and 576; *Clark v. Rochester and Syracuse Railroad Company*, 14 N. Y. 570, and *Evans v. Fitchburg Railroad Company*, 111 Mass. 142; s. c., 15 Am. Rep. 19; *The Great Western Railway Company v. Blower*, 2 Eng. Rep. 700. As to the fifth request, we find nothing in the pleadings or the evidence which would warrant such a charge. The defendant set up no counter-claim for freight, and perhaps if it had, the reply might have been that the freight had been paid. The defendant's own evidence showed that it was not entitled to freight for forty-two head of horses at three dollars and a half per head, as claimed in this request, but at most, to only sixty dollars, the rate for the two cars used. It may be that, under the principles established by the cases of *Ewart v. Kerr*, Rice, 203, and *Dyer v. The Grand Trunk Railway Company*, 42 Vt. 441; s. c., 1 Am. Rep. 350, upon proper allegations, supported by sufficient proof, the defendant, in a case like this, might be entitled to a deduction for freight, but in the case as presented to us we see no warrant for such a charge as that asked for.

We are unable to discover any error in the refusal of the Circuit judge to charge as requested, and the motion is, therefore, dismissed.

WILLARD, C. J., concurred.

EX PARTE BOND.

(9 S. C. 80.)

Habeas corpus — judgment voidable or void.

Although a prisoner convicted of assault with intent to kill cannot lawfully be sentenced to confinement in the penitentiary at hard labor, such sentence is not void, but only voidable, and relief can be obtained only by appeal and not by *habeas corpus*.

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PETITION for a writ of *habeas corpus*. The opinion states the facts.

Monteith and Green, for petitioner.

The Solicitor, contra.

HASKELL, A. J. The prisoner was tried at Columbia Fall Term, 1875, and convicted of assault with intent to kill. The presiding judge thereupon sentenced him to confinement in the State penitentiary, at hard labor, for four years, and the petitioner, under a writ of *habeas corpus*, now seeks a discharge upon the ground that the punishment imposed by the sentence is not authorized by law. In the case of *The State v. Hord*, 8 S. C. 84, for assault with intent to kill, it has recently been decided, on appeal (opinion by MOSES, C. J.), that the offense is not punishable by confinement in the State penitentiary. Does such error of law, in the judgment by virtue of which this prisoner is detained, render the judgment of the court void? If it does not, the prisoner cannot be discharged. Says Chief Justice MARSHALL: "An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity, and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous." *Ex parte Watkins*, 3 Pet. 193.

A judgment may be voidable and yet not void. When voidable, the remedy is by appeal — "the only mode of reviewing a judgment or order in civil or criminal action." R. S. 654, § 349.

When void, and it affects the liberty of a person, relief by *habeas corpus* may be had. Upon that distinction all the cases rest; and although the distinction may sometimes be finely drawn and judges may differ as to the character of the particular process under which a prisoner is detained, they all concur in the principle above stated. If the court has general jurisdiction of the subject an erroneous judgment is voidable. If the court has not such jurisdiction its judgment is void. "Where a court of record has jurisdiction of the subject-matter and the party, its judgment, though erroneous, must stand until rescinded by the proper tribunal; * * * its order must avail until reversed in the mode 'provided by law, which, under our practice, is by appeal.'" *In re Stokes*, 5 S. C. 71; *Ex parte Watkins*, 3 Pet. 206; *Elliott v. Piersoll*, 1 id. 340.

In *Brennan and Galen's* case it was submitted that the imprisonment was by virtue of a sentence contrary to law.

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Lord DENMAN, C. J., said : " We think, however, the court having competent jurisdiction to try and punish the offense, and the sentence being unreversed, we cannot assume that it is invalid or not warranted by law, or require the authority of the court to pass the sentence to be set out by the jailer upon the return. We are bound to assume, *prima facie*, that the unreversed sentence of a court of competent jurisdiction is correct ; otherwise, we should, in effect, be constituting ourselves a court of appeal, without the power to reverse the judgment." 59 E. C. L. 492.

In *Bethell's* case " it was held, *per curiam*, that the commitment was naught, first, because it was not to the sheriff, who is the legal and immediate officer to every court of *oyer and terminer*; second, because the word *committitur* is necessary to the form of a legal commitment. Then the question was whether he could be discharged," and it was said : " Where a commitment was without a cause, a prisoner may be delivered by *habeas corpus* ; but where there appears to be a good cause, and a defect only in the form of the commitment, as in this case, he ought not to be discharged." And as to the other matter, they said " that though the commitment ought in strictness be to the sheriff, yet a jailer is a known officer in law, and his custody is the custody of the sheriff to many purposes ; therefore, let him bring his writ of error, for we will not discharge him on the *habeas corpus*." 1 Salk. 348.

The petitioner claims that his sentence should have been confinement in the county jail, and not in the penitentiary. The same reasoning applies as in *Bethell's* case.

The cases *Rex v. Ellis*, 5 B. & C. 395, and *Rex v. Bourne*, 7 Ad. & Ell. 58, were carried up by a writ of error, and not applicable. The other cases relied on were decided and the prisoners discharged either upon the ground that the court had not originally jurisdiction of the case, or, as in the case *Ex parte Lange*, 18 Wall. 163; and the *Tweed* case, 60 N. Y. 559; s. c., 19 Am. Rep. 211; where the sentence had been passed and executed, and the court passed a second sentence under the same verdict, on the ground that " the power of the court was exhausted " and that its second sentence was null and void. It is unnecessary to consider the case of *De Hay*, 3 S. C. 564, as the principle upon which this decision rests is not concluded by that case.

The motion to discharge the prisoner is refused.

WILLARD, C. J., and McIVER, A. J., concurred.

Motion refused.

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WILMINGTON, ETC., RAILROAD COMPANY V. GREENVILLE, ETC.,
RAILROAD COMPANY.

(9 S. C. 225.)

Contract — carrier — action by one against another connecting, for failure to deliver goods to carry.

In the absence of any contract between the owners of two connecting railroads, one cannot maintain an action against the other for failing to ship cotton over the plaintiffs' road which the other road had transported to the point of connection; and the fact that the owners of the cotton had contracted with the plaintiff to ship the cotton over its road does not give it a right of action against the defendant.

ACTION for damages for failure to deliver goods to carry. The opinion states the facts. The plaintiffs had judgment on demurrer.

Rion, for appellant.

Melton, Chamberlain & Wingate, contra.

McIVER, A. J. This action was brought to recover damages alleged to have been sustained by the plaintiffs, the owners of a railroad running from Augusta, Ga., to Columbia, S. C., and thence to Wilmington, N. C., by reason of the refusal of the defendants, the owners of a railroad running from Greenville to Columbia, S. C., to deliver to the plaintiffs 836 bales of cotton, shipped by sundry persons along the line of the Greenville and Columbia Railroad and consigned to various persons in the city of New York. The bills of lading given by defendants to the shippers specify that the cotton was to be forwarded by the Atlantic Coast Line—a through connecting line to the city of New York, of which the plaintiffs' road forms a part. The damage claimed is the amount of freight which the plaintiffs would have been entitled to if the cotton had been transported over their road and also the freight which would have been earned by the other connecting links, for which it is alleged the plaintiffs are liable according to the custom of dealing among railroad companies. The defendants demurred upon the ground that the complaint does not state facts sufficient to constitute a cause of action, and the Circuit judge having sus-

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tained the demurrer, the plaintiffs duly excepted and now bring this appeal.

It will be observed that while the complaint does not present the case of an action *ex contractu*, it is, and must necessarily be, founded upon or grow out of the contract evidenced by the bills of lading; for without such contract the plaintiffs would have no more cause of complaint than they would that *every* bale of cotton or other article brought to Columbia by the defendants for transportation to New York was not shipped by their trains. In order to maintain this action the plaintiffs are bound to show not merely that they have sustained damage or loss by the acts or omissions of the defendants, but they must also show that such damage or loss has been the result of the violation of some *legal* right of the plaintiffs. Now, in this case the damage or loss complained of is the withholding the cotton from shipment by the plaintiffs' trains; but where is the legal right which has been violated? If it exists at all, it must necessarily, as we have seen, be founded on the contract contained in the bills of lading; for unless the plaintiffs have a *legal* right to have *all* the cotton brought to Columbia by the defendants for shipment to New York shipped by their trains, which of course is not pretended, then there is no conceivable reason why they can claim the *legal* right to have this particular cotton so shipped except by virtue of such contract. But the obligations which the defendants incurred and the duties which they owed by reason of that contract were to the shippers and not to the plaintiffs. Hence the legal right acquired by that contract inured to the shippers and not to the plaintiffs.

This is clear, from the fact that the shippers alone could release the defendants from the obligations incurred by that contract, and might, at any time, with the consent of the defendants, vary or modify, or even abrogate, the contract, without any regard to the consent or the wishes of the plaintiffs. If then, the plaintiffs are compelled to base their action upon such contract or upon the damages which they have sustained by reason of the violation of the obligations or duties which the defendants thereby assumed, the only question remaining is, can the plaintiffs, who are not parties or privies to such contract, maintain this action? Clearly they cannot; for whether the action be brought directly upon the contract or is in the nature of an action on the case for damages sustained by reason of its breach, it is plain, both on principle and authority,

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that the action cannot be maintained except by those who are either parties or privies to such contract.

In 3 Addison on Torts, 11, 12, it is said: "It is essential that the thing complained of should be legally wrongful as regards the party complaining,—that is, it must prejudicially affect him in some legal right; merely that it has done him harm is not enough." And at page 13, he says: "Whenever an action of tort is founded on contract * * * * * the plaintiff who brings the action must be a party to the contract, for no person can, in general, sue in respect of a tort founded on contract who was not a party or privy to and could not have been sued upon the contract."

In *Clancy v. Byrne*, 56 N. Y. 129; s. c., 15 Am. Rep. 391, which was an action to recover damages sustained by the plaintiff in the loss of his horse, occasioned by a rotten plank in a pier, brought against the defendant, the lessee of the pier, who had covenanted with his landlord to make all necessary repairs, and had sublet the pier to a third person, the court, while intimating that the defendant might be liable upon other grounds, uses this language: "This is not an action upon the covenant of the defendant. * * * * * If it were an action upon the covenant it could not be maintained. The plaintiff is not a party thereto, nor in privity therewith; nor can this action be maintained as one of tort, founded upon a breach of the covenant. Doubtless where a covenant creates a duty a neglect to perform that duty is a ground of action for tort. But whenever a wrong is founded upon a breach of contract, the plaintiff suing in respect thereof must be a party or privy to the contract, else he fails to establish a duty toward himself on the part of the defendant and fails to show any wrong done to himself."

In *Gray v. Ottolengui*, 12 Rich. 108-9, WITHERS, J., in delivering the opinion of the court, says: "Whenever redress is sought for an injury arising out of a breach of a contract, whether the action be conceived in form *ex contractu* or *ex delicto*, some privity of contract must limit the range of a plaintiff in seeking those who are liable to him." See also *Winterbottom v. Wright*. 10 M. & W. 109, and the other authorities cited in respondent's brief.

We are, therefore, unable to perceive any error in the decision of the Circuit judge.

The motion is dismissed.

WILLARD, C. J., and HASKELL, A. J., concurred.

WILLIAMS v. VANCE.

(9 S. C. 344.)

Damages — when liquidated.

V. & M. agreed to consign and ship to W. & Co. 500 bales of cotton, to be sold by them as cotton factors, on commission, and to pay as liquidated damages \$2 per bale for every bale of cotton less than 500 bales which they might fail to consign and ship to them as stipulated. *Held*, that the \$2 per bale was liquidated damages. (*See note, p. 28.*)

ACTION for foreclosure of a mortgage executed as collateral to a contract, by which defendants agreed to consign and ship to plaintiffs five hundred bales of cotton, to be sold by them as cotton factors upon commissions of two and a half per centum, and to pay as liquidated damages two dollars for each and every bale of cotton less than five hundred bales which they might fail to consign and ship to them as stipulated.

Burt & Graydon, for appellants.

Cothran and McGowan & Parker, contra.

WILLARD, C. J. The next question arises on the language of the contract immediately following the agreement to consign 500 bales of cotton, which is as follows: "And to pay as liquidated damages two dollars for each and every bale of cotton less than 500 bales which they might fail to consign and ship to them as stipulated."

The right of parties to a contract to fix the amount of damages, in their nature unliquidated, by an agreed sum or rate of damages is fully recognized by all the authorities. This does not apply to cases where the damage is fixed by law, as in case of damages in failure to pay money stipulated, because in these cases the damage is not in its nature unliquidated, but the rule of damages is fixed with regard to considerations of public policy. It will not be necessary to consider the various exceptions depending on the same general principle above stated, as they do not affect the present case.

In cases where the parties are at liberty to fix the measure of damages by an agreed sum or rate, the question is one of intent

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merely. When the parties declare that the sum or rate fixed shall be deemed liquidated damages, and the case is one in which they are at liberty so to declare, such declaration must stand unless inconsistent with other parts of the same instrument or unreasonable in itself.

In inquiring whether it is reasonable it is not necessary to ask whether it is wise or considerate, but whether it is in conflict with the principles and practices that govern transactions of a like nature. This certainly cannot be affirmed of the present stipulation. It does not fix a round sum incapable of adapting itself to the degree of failure to perform, but a rate by which a greater or less failure might be measured. We cannot say from any thing before us that that rate is either more or less than the actual damage that could be proved. We have a measure of damage in part in the agreed rate of commissions, but we cannot say from the record that there was no other measurable element of value to the plaintiffs in the consignments of cotton than the commissions to be earned. General experience, if we could resort to it, would lead to an opposite conclusion.

It was perfectly reasonable, in providing for further mercantile transactions that might be interrupted by unforeseen circumstances, that the parties should fix a rule of liability by means of which, in case of failure to perform, their accounts might be adjusted without the necessity of a lawsuit.

When the contract, according to its intention, is one of liquidated damages, it becomes necessary, before applying such rule of damage, to inquire whether the breach and the damage in any particular case is of the kind in the contemplation of the parties in fixing the measure of liability. While many cases have arisen where the resulting damage has been found so essentially different from that contemplated by the parties as to defeat the apparent intent of the contract in that respect (*Higginson v. Meld*, 14 Gray, 156), the present case is free from any such aspect. The case that has arisen, is obviously the very case contemplated by the parties in fixing the measure of liability imposed. We find nothing to prevent the express declaration of the parties in this respect from having its full force and effect.

The plaintiffs are entitled to the sum stipulated in respect of each bale which the defendants V. & M. failed to ship in accordance with their contract, in addition to the sum already referred to.

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The decree and the report of the referee must be set aside so far as they conflict with the foregoing determinations and the cause remanded for further proceedings conformable herewith.

Remanded.

McIVER, A. J., and HASKELL, A. J., concurred.

NOTE BY THE REPORTER.—From the learned argument of the appellants' counsel in this case we derive the following principles of law deducible from the cases on the subject of liquidated damages, which we believe correctly stated:

1. That the intention of the parties controls the particular phraseology.
2. That the intention must be ascertained from the words used.
3. That the disproportion between the sum to be paid and the actual damage is not to be considered in the inquiry whether the parties intended it as a penalty or as liquidated damages, if the intent is clear.
4. That when the intention is not clear, the courts incline to consider the sum a penalty, although the words "liquidated damages" are used, in cases for the performance of various things of different degrees of importance.
5. That the instrument, as well as the words, may be consulted in ascertaining the intention — as a bond, a covenant, etc.
6. That the word "penalty" and the context may control the meaning of the phrase "liquidated damages," and the latter and the context may control the word "penalty."
7. That the phrase "liquidated damages" has a meaning as definite and precise as the word "penalty."
8. That the early English and American cases have been modified by recent decisions.
9. That a sum agreed to be paid for the doing or not doing of a particular act, within the power of the party, is always liquidated damages or an alternative agreement.

Sedgwick (Meas. Dam. [421]) lays down the following rules: "*First*. That the language of the agreement is not conclusive, and that the effort of the tribunal will be to get at the true intent of the parties, and to do justice between them. In England there seems to be a readier disposition to uphold the liquidation of damages than in this country; and I cannot but express my opinion that the courts of the United States have shown an unwise reluctance to admit the agreement as conclusive on this point. If the purpose is clear there seems no reason to hesitate in giving it full effect. *Second*. That when the agreement is in the alternative to do a particular thing or pay a given sum of money, the court will hold the failing party to have had his election, and compel him to pay the money. *Third*. That in case of an agreement to do some act, and upon failure, to pay a sum of money, the court will look into the intent of the parties; that no particular phraseology will be held to govern absolutely; but that although the term 'liquidated damages' will not be conclusive, the phrase 'penalty' is generally so, unless controlled by some other very strong consideration. *Fourth*. That if the sum be evidently fixed to evade the usury laws, or any other statutory provisions, or to cloak oppression, the courts will relieve by treating it as a penalty. Consequently, whenever the sum stipulated is to be paid on the non-payment of a less sum made payable by the same instrument, it will always be held a penalty. *Fifth*. That when independently of the stipulation the damages would be wholly uncertain, and incapable or very difficult of being ascertained except by mere conjecture, then the damages will be usually considered liquidated, if they are so denominated in the instrument."

Wood, in a note to Mayne on Damages, 208, says: "To summarize, it may be said, that where the damages are uncertain, and not susceptible of ready ascertainment, and the sum fixed upon as damages is not unreasonable or unconscionable in view of the probable damage, and from the whole contract and the surrounding circumstances such appears to have been the intention of the parties, such sums will be treated as liquidated damages; but when the damages are certain, and susceptible of ready ascertainment, or where the sum fixed upon is out of all proportion with the probable damages, it will be treated as a penalty."

In *Criader v. Bolton*, 3 C. & P. 240, it was held that either phrase, "penalty" or "liquidated damages," may be controlled by some other strong consideration; neither, therefore, is absolutely conclusive. BENT, C. J., also said: "The law in relation to liquidated dam-

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gas has always been in a state of great uncertainty. This has been occasioned by judges endeavoring to make for parties a better contract than they have made for themselves." "A court has no more authority to put a different construction on the part of an instrument ascertaining the damages than it has to decide contrary to any other of its clauses."

In *Taylor v. Sandiford*, 7 Wheat. 13, MARSHALL, C. J., said: "In general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty. It will not of course be considered as liquidated damages, much stronger is the penalty, where it is expressly reserved as one. The parties themselves denominate it a penalty and it would require very strong evidence for this court to say that the words of the parties do not express their intention."

Where the words are clear and explicit, the extravagance of the sum cannot be considered. *Bagley v. Peddie*, 5 Sandf. 192. "Where the intention is clear, the disproportion of the sum to the actual damage cannot be considered." *Bearden v. Smith*, 11 Rich. 550. In *Dakin v. Williams*, 17 Wend. 447, the court say they have no dispensary power; cannot inquire whether the parties acted wisely or foolishly; parties may give away their property and the court cannot interfere.

But where the words "liquidated damages" are not employed, the tendency is to regard the sum as a penalty. *Reilly v. Jones*, 1 Bing. 303; *Astley v. Weldon*, 2 B. & P. 346.

In *Astley v. Weldon*, 2 B. & P. 346, the rule is laid down that "when the agreement contains several distinct covenants on which there may be divers breaches, some of an uncertain nature and others certain, with one entire sum to be paid on breach of performance, the contract will be treated as a penalty." "When it is agreed that if a party do such a particular thing such a sum shall be paid him, the sum stated may be treated as liquidated damages."

This rule was approved in *Smith v. Smith*, 4 Wend. 468, in which a bond was given in the penalty of \$10,000 not to practice as a physician, and if the obligor did, that he should pay \$500 for every month that he so practiced — the \$10,000 held a penalty, but the \$500 liquidated damages.

But in *Stosson v. Beadle*, 7 Johns. 72, BRAXTON, J., said: "This does not belong to the class of cases in which the question of liquidated damages has actually arisen. It will be found in most, if not all, of those cases that there was an absolute agreement to do or not to do a particular act, followed by a stipulation in relation to the amount of damages in case of a breach."

In *Bearden v. Smith*, 11 Rich. 550, the court said: "The distinction between a penalty and liquidated damages is, that the one is a surety for, and the other to be paid in lieu of the act to be done."

In a note to *Spencer v. Tilden*, 5 Cow. 150, the learned reporter says: "This doctrine, which converts damages apparently stipulated or fixed by the parties into a penalty, came from the civil law, through the Court of Chancery, and has at length obtained a firm hold in the courts of common law. It is obvious that, in order to enforce it, courts must disregard the particular expressions of the parties; for the moment we agree that a party may by calling a real penalty liquidated damages, or throwing it in the form of an alternative in a contract, or substituting its payment for some specified default, secure the whole to himself, without regard to the real damages, we bring back the oppressive rule of the common law. The griping creditor will always use the particular form or phraseology of contract which will secure him his pound of flesh, unless the courts interfere in all cases and tell him that, from the very nature and essence of his bond, whatever he claims, and in whatever shape or upon whatever footing, if it be in truth plainly beyond the legal amount of damages, so far it shall be no more than nominal."

Hence he concludes that the rule laid down by Mr. Holt, in his note to *Barton v. Glover*, Holt's N. P. Rep. 43, is the true one, viz.: "Where a sum of money, whether in the name of a penalty or otherwise, is introduced in a covenant or agreement merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed or contract, and the penalty only as accessory, and, therefore, only to secure the damages really incurred."

Upon the dissolution of a copartnership at law, the outgoing partner covenanted not to interfere with the clients of the late firm, or carry on the business of an attorney

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within fifty miles of a place named, nor in any respect infringe that covenant. Breach held to entitle plaintiff to recover whole amount stipulated. *Galsworthy v. Strutt*, 1 Exch. 659.

In *Kemble v. Farren*, 6 Bing. 141, the plaintiff agreed to pay to defendant £3 8s. and 6d. per night for performing in his theater for four seasons, and the agreement contained a stipulation for the payment of £1,000 if either party should neglect or fail to fulfill the agreement, and the said sum was declared by the parties to be *liquidated damages and not a penalty*. Breach that defendant refused to act during the second season, and plaintiff claimed £1,000. Verdict for plaintiff £750, subject to a motion to increase the verdict to £1,000 if the court should adjudge it to be a case of liquidated damages. The verdict held to be correct. The chief justice, in delivering the opinion of the court, said: "It is difficult to suppose any words more precise or explicit than those used in the agreement; the same declaring, not only affirmatively that the sum of £1,000 should be taken as liquidated damages, but negatively also that it should not be considered as a penalty or in the nature thereof."

In *Crisdee v. Bolton*, 3 C. & P. 240, £500 were agreed to be a penalty, to be paid as liquidated damages if defendant should set up a victualing house in one mile of that sold to plaintiff. Held, liquidated damages. See, also, *Barton v. Glover*, Holt's N. P. Cas. 208; *Pierce v. Fuller*, 8 Mass. 223; *Mott v. Mott*, 11 Barb. 187; *Reynolds v. Bridge*, 6 Ell. & B. 523.

In *Low v. Peers*, 4 Burr. 2396, Lord Mansfield remarked on covenants in general and covenants secured by a penalty or forfeiture, and said in the latter case the party may recover the penalty; that the penalty is the particular sum liquidated by the parties, and is, therefore, the proper amount of damages.

In *Fletcher v. Dyche*, 3 T. R. 37, a bond was given in a penalty of £200, conditioned for finishing certain iron work by a specified day, and to forfeit and pay £10 for every week after that time until it was finished. Held, liquidated damages.

In *Hurst v. Hurst*, 4 Exch. 571, in an action on covenant not to top trees under a given penalty for each tree. Held, liquidated damages.

In *Slosson v. Beadle*, 7 Johns. 72, the agreement was that in consideration of \$500 paid for fifty acres of land the defendant would convey the land in one year, or in lieu thereof pay \$800. Held, liquidated damages.

In *Hasbrook v. Tappen*, 15 Johns. 200, the agreement was for the conveyance of certain lands at a fixed time, the price to be paid on the delivery of the deed, and the parties bound themselves in case of failure to pay the one to the other \$500 as liquidated damages. Held, liquidated damages.

In *Knapp v. Matthy*, 13 Wend. 587, the covenant was to assign a lease and give possession, and for failure of either of the covenants to forfeit \$500 as the liquidated damages. Held, as "a clear case of liquidated damages if the parties have power to liquidate them."

In *Dakin v. Williams*, 17 Wend. 447; 22 id. 201, defendants sold to plaintiff a newspaper in Utica for \$3,000, with subscription, good-will and patronage of the paper, and defendants agreed not to establish a paper in Utica, nor suffer one in any of their buildings, nor aid or assist in establishing one, and bound themselves in \$3,000 for the performance of each and every part of the covenant, and that the sum of \$3,000 was fixed and settled as liquidated damages, and not as a penalty, for violation of the covenant in any of its terms or conditions. Held, liquidated damages. In this case all the cases were reviewed, and the principle is maintained that the parties have the same right to make a contract fixing the amount of damages as to make any other contract.

In *Pearson v. Williams*, 26 Wend. 690, a purchaser of lots engaged to erect on the lots two brick buildings by a certain day or to pay on demand \$4,000. Held liquidated damages.

The cases of *Astley v. Weldon* and *Kemble v. Farren*, 6 Bing. 141, were reviewed and approved in *Heard v. Bowers*, 23 Pick. 455.

In *Atkinson v. Kinnier*, 4 Exch. 776, PARKE, J., said *Kemble v. Farren* was "somewhat stretched," and if a party agrees to pay a sum for the non-performance of a contract, consisting of one or more stipulations, the breach of which cannot be measured, then stipulated damages, and not a penalty, must be taken to have been meant.

Green v. Price, 18 M. & W. 700, was an agreement not to do business as a perfumer in the cities of London and Westminster, and defendant bound himself in the sum of \$2,000 to be paid as liquidated damages and not as a penalty. Held liquidated damages.

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Low v. House, 3 Hill (S. C.), 370, was a covenant by which the parties bound themselves in the sum of \$2,000 to execute an agreement by which plaintiff was to convey to defendant a tract of land and defendant to pay for it \$5,000. *Held* a penalty.

Owens v. Hodges, 1 McM. 114, was a bond in a penalty to abide an award. *Held* a penalty.

Bearden v. Smith, 11 Rich. 554, was an agreement without seal to forfeit \$100 if defendant failed to put plaintiff in possession of a house and lot. *Held* a penalty.

Allen v. Brazier & Randolph, 2 Ball. 298, was an agreement to deliver a slave to plaintiff on a certain day or pay \$100. *Held*, liquidated damages.

In *Worrell v. McClintaghan*, 5 Strob. 115, the agreement was that a building should be finished by a particular day, and \$100 a month be deducted from the price after that day until finished. *Held*, that the sum of \$100 per month agreed to be paid by defendant was liquidated damages, and that the jury should have been so charged as matter of law.

In none of the last five cases was the phrase "liquidated damages" employed, and yet in two of them the sum stipulated to be paid was held liquidated damages and not a penalty.

A review of the English and New York cases that have been cited shows that the only consideration which takes from the phrase "liquidated damages" its force is that a number of things of different degrees of importance was agreed to be done, and consequently the damages for each one could not have been intended to be the sum agreed upon by the parties.

The later case of *Esmond v. Benschoten*, 12 Barb. 366, seems to repudiate that exception. The covenant in that case was to convey land and to deliver a lot of hay, some apple trees and part of a growing crop of grain, and the other party covenanted to pay a sum of money and to execute a bond of indemnity against two mortgages, and if either party failed to perform, to pay the other \$500 as "liquidated damages." *Held*, liquidated damages.

The recent English and New York cases, and especially the latter, appear to have modified the earlier cases and to have given to the phrase "liquidated damages" its usual and proper signification, and more fully to recognize the right of parties to make their own contracts, as will appear from the following cases :

In *Farnham v. Ross*, 2 Hall, 167, the covenant was to finish a building by a certain day, under a "penalty of \$20 a day for every day thereafter that it should remain unfinished, to be paid as liquidated damages." *Held*, liquidated damages.

To the same effect are *Holmes v. Holmes*, 12 Barb. 137; *Mundy v. Culver*, 18 id. 336; *Hamer v. True*, 19 id. 106; *Bagley v. Peddie*, 16 N. Y. 469; *Dunlop v. Gregorie*, 6 Seld. 245.

In *Bagley v. Peddie*, 16 N. Y. 469, a bond declared the obligors bound "in the sum of \$2,000 as liquidated damages, and not by way of penalty or otherwise," for the performance of the covenants in a written agreement. None of the covenants were for the payment of money, or for the doing or omitting of any act the damages resulting from which could be computed from data furnished by the instrument itself, but the damages from any breach were uncertain, and required evidence outside the instrument to establish their amount. One of the covenants was not to reveal the secrets of a trade in which the principal obligor was to be employed, or any invention or improvement that might be made by his employer, the obligee. *Held*, that a breach of this covenant involved damages so uncertain and difficult to be ascertained, as that the sum named in the bond should be deemed not a penalty but liquidated damages, recoverable upon the breach of any of the covenants, although the damages from an actual breach might be readily determined by a jury. The court lay down the following rules : "First. The language of the agreement is not conclusive, and the effort of the court is to learn the intent of the parties. Hence the term 'liquidated damages' is not sufficient to control the construction if the court can discover in the other parts of the instrument reason even to doubt as to the intention of the parties; Second. Where the word 'penalty' is used it is generally conclusive against its being held liquidated damages, however strong the language of the other parts of the instrument in favor of such construction; Third. If the sum stipulated is to be paid on the non-payment of a less sum which is certain in amount (or, as some judges say, can be easily ascertained by a jury) and made payable by the same instrument, then it will be treated as a penalty; Fourth. When the agreement is in the alternative to do an

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act or pay a given sum of money, the court will hold the party failing to have had his election, and compel him to pay the money; Fifth. If the sum be evidently fixed to evade the usury laws, or any other statutory laws, or to cloak oppression, the court will relieve by treating it as a penalty; Sixth. If independently of the stipulated damages, the damages would be wholly uncertain and incapable of being ascertained except by conjecture, in such case the damages will be considered liquidated if they are so denominated in the instrument; Seventh. If the language of the parties evince a clear and undoubted intention to fix the sum mentioned as liquidated damages in case of default of performance of some act agreed to be done, then the court will enforce the contract, if legal in other respects."

Unless the intent of the parties is very clearly expressed, a forfeiture named for non-fulfillment of a contract, where excessive, will not be construed as intended to be liquidated damages. Thus when a contract for doing a piece of work in building a vessel stipulated for its completion by a specified time, "under a forfeiture of \$100 per day for each and every day after the above date, until the same is completed," held, a penalty. *Cotwell v. Lawrence*, 38 N. Y. 71.

Where the damages are in their nature wholly indefinite and uncertain, and the parties have mentioned a specific sum as liquidated damages, it will be so regarded, unless it be greatly disproportioned to any probable estimate of the actual damages, and although it is to be paid on the breach of any one of several stipulations of different degrees of importance. *Cotwell v. Talmage*, 9 N. Y. 551.

We add some references to some of the more important of the more recent cases.

In *Noyes v. Phillips*, 60 N. Y. 408, the agreement was to exchange lands and give a good and sufficient deed, or "forfeit the sum of \$500." The court held that in an action for a breach of the contract, the plaintiff was not limited to the amount of the penalty. Upon the question of liquidated damages or penalty, they said: "We do not think that the exception of the defendant raises the question whether the sum named is a penalty or liquidated damages. It is quite evident that he did not claim on the trial that it was liquidated damages, and the only construction which can be given to his request to charge, is that assuming it to be penalty, the jury should be instructed in awarding damages not to exceed the sum of \$500, which was refused and an exception taken. It is unnecessary, therefore, to determine the question of liquidated damages. It is, however, proper to say that if that question was before us we should hesitate in holding it a penalty, and there are many reasons for regarding it as a provision fixing the measure of damages by the parties. The word "forfeit" is not conclusive. A fundamental rule upon this subject is that the words employed must in general yield to the intention of the parties as evinced by the nature of the agreement, the amount of the sum named, and all the surrounding circumstances. The sum named is reasonable in amount for a failure to perform this agreement; it is payable for one breach, viz: a failure to deliver a deed, and the injury is in some degree uncertain in amount and extent and might depend upon many unforeseen contingencies. These are material circumstances favorable to an inference that the parties intended to fix the sum as the measure of damages. The question has been frequently before the courts, and authorities may be found apparently favoring either construction. As it is unnecessary to decide the question, it is only proper to disclaim an intention to decide that the sum named in this contract ought in law to be regarded as a penalty. Courts have felt embarrassed, when called upon to enforce inequitable, harsh or oppressive provisions in contracts inserted often without reflection or a full knowledge of their legal effect, by a laudable desire to harmonize the abstract principles of right and justice with the established legal rules that parties are at liberty to make contracts for themselves, and that it is the duty of courts to enforce them as made. By a liberal use of the element of supposed intention they have been enabled to do so to a reasonable extent, and yet a reference to a few of the numerous authorities will illustrate the difficulties experienced in this respect. N. Y. 551; 21 id. 253; 1 id. 450; 5 Cow. 144, note b.; 3 Johns. Cas. 297; 22 Wend. 201; 2 T. R. 32; 11 Ind. 70; 8 Mass. 223; 5 Allen, 304; 13 Wend. 588; 12 Barb. 366; 17 id. 200; 15 Abb. Pr. 273; 38 N. Y. 74; 6 East, 529; 3 Pars. on Cont. 156. For the purpose of this case, we must regard the provision as a penalty."

Y. conveyed land to H. for an expressed consideration of \$700, in payment for which H. gave Y. a contract to convey to him other land, the consideration named being \$700, and

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in case of his failure to convey, covenanted to pay Y. \$700 "as a penalty." *Held*, that this did not limit Y.'s right of recovery of the actual consideration paid by him to H. although it exceeded \$700. *Yenner v. Hammond*, 38 Wis. 277.

A covenant to pay heavy liquidated damages in case of non-performance of a contract, so far as it is clearly applicable, will be enforced, but it will not be extended by implication. So when defendant contracted to sell plaintiff certain premises, and at a specified time and place, upon payment of the purchase-money, to execute and deliver a proper deed for the conveyance of the fee-simple, free of incumbrances, containing covenants against the acts of the grantor; and in case of failure or refusal to execute a proper deed, as specified, defendant agreed to pay \$5,000 which was stipulated as liquidated damages for such non-performance; *held*, that this covenant applied only to the agreement to execute a deed, not to the warranty of title implied from the agreement to sell, and that where a deed was tendered in form as prescribed by the contract, a defect of title beyond the power of defendant to remedy did not render it liable thereon. *Leggett v. Mutual Life Ins. Co. of N. Y.*, 53 N. Y. 394.

Where a contract prescribed payment of one and the same round sum for the default of the promisor to obtain for the promisee title to any of certain lands, or to obtain a privilege of selection between certain lands, and made no difference between a total and a partial default, *held*, that the sum must be considered a penalty. *Lyman v. Babcock*, 40 Wis. 508. The court say: "Where the sum is agreed to be paid for a single breach of the contract, and the damages are wholly uncertain in amount, and the sum is not apparently disproportionate to the injury, all the cases agree that the sum should be recovered as the damages liquidated by the parties themselves for the breach.

Where the sum is agreed to be paid for any of several breaches of the contract, and the damages resulting from any are certain in amount, or there is a fixed rule for measuring them, all the cases agree that the sum should be held as penalty, and the recovery limited to actual damages.

Where the sum is agreed to be paid for any of several breaches of the contract, and the damages resulting from all of them are uncertain, and there is no fixed rule for measuring them, but the breaches are apparently of various degrees of importance and injury, the cases are conflicting in the rule, whether the sum should be held as a penalty or as liquidated damages.

On principle, we are very clear that in such a case the sum should be held as a penalty. For it appears to us that it would be as unjust to sanction a recovery of the sum agreed to be paid, alike for any one trivial breach, or for any one important breach, or for breach of the whole contract, as it would be to sanction such a recovery equally for damages certain and uncertain in their nature. The rule holding the sum to be a penalty in the latter case, goes upon the injustice of allowing such a recovery for a less amount of actual damages ascertained or readily ascertainable. And we cannot but think that there is like injustice in allowing such a recovery equally, in cases of damages, uncertain indeed, but manifestly and materially different in amount, equally for breach of part of the contract, and for breach of the entire contract. Such a rule would not only put the same value on a small part as on a large part, but would put the same value on any part as on the whole."

In *Trouser v. Elder*, 77 Ill. 452, A and B entered into a contract as follows: Whereas, A has this day sold all his business interest, influence and patronage in the banking business, and also his bank safe, together with all the fixtures pertaining to the business of banking at M, etc., and he also agrees not to engage in the banking business in said M, for which franchises, benefits and privileges, B pays to A the sum of \$1,250, and said A, on his non-compliance with the foregoing recited engagements, forfeits threefold the amount paid to him by B, as damages for such non-compliance: *Held*, (1) that the bank safe, fixtures, etc., were sold in connection with the banking business, interest, patronage, etc., and that the undertaking by A not to engage in the banking business was a part of the same contract, and that the safe and fixtures formed part of the consideration for which the \$1,250 were paid. (2) That the sum named was a penalty to secure the performance of the entire contract, and not liquidated damages, to be recovered for the breach of a single stipulation, in accordance with the well-established rule, that where there are several covenants or stipulations in an agreement, the damages for the non-performance of some of which are readily ascertainable by a jury, and the damages for the non-performance of the others

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are not measurable by any exact pecuniary standard, and a sum is named as damages for a breach of any of the covenants or stipulations, such sum is held to be merely a penalty. Citing *Astley v. Weldon*, 2 B. & P. 846, 858; *Davies v. Panton*, 6 B. & C. 216, 284; *Crisdee v. Bolton*, 6 C. & P. 240, 243; *Watt's Exrs. v. Shepherd*, 3 Ala. 425; *Niver v. Rossman*, 18 Barb. 51; *Berry v. Wisdom*, 8 Ohio St. 241; *Lampman v. Cochran*, 16 N. Y. 275; *Foley v. McKeegan*, 4 Iowa, 1; *Basye v. Ambrose*, 28 Mo. 89; *Higginson v. Weld*, 14 Gray, 165; *Nash v. Hermosilla*, 9 Cal. 584; *Hamilton v. Overtun*, 6 Black, 206; *Datley v. Litchfield*, 10 Mich. 39; *Carpenter v. Lockhart*, 1 Ind. 484.

In *Hamaker v. Schroers*, 49 Mo. 406, A entered into a contract with B, by the terms of which A agreed to deliver to B 100 grain and seed drills of a particular pattern, within a specified time. The full contract prices of the drills was \$1,600, and A was to be at the whole expense of getting them up. As an indemnity, and to guarantee the faithful performance of the contract, he executed and delivered a bond in the sum of \$1,600, conditioned that he would fully comply with the agreement. Held, that the amount named in the bond should be treated as a penalty, and not as liquidated damages. The court said: "The court properly declared the law in reference to the character of the bond, and held that the damages therein provided for were not in the nature of liquidated or stated damages. Where the parties have agreed that in case one of them shall do a stipulated act, or omit to do it, the other party shall receive a certain sum as the just, appropriate and conventional amount of damages sustained by such act or omission, courts will not interfere to grant relief, but will deem the parties entitled to fix their own measure of damages, provided that the damages do not assume the character of gross extravagance, or of wanton and unreasonable disproportion to the nature and extent of the injury; and whether a sum inserted in an instrument, to be paid in case of breach, is to be regarded as a penalty or liquidated damages, must be determined by the nature of the contract and its provisions. If the whole scope of the writing shows that it is intended as a penalty, it will be so treated, without reference to any particular language the parties may have used."

If in a written contract for the payment of money the obligor agrees to pay a sum certain, by way of compensation to the payee, in case of failure to discharge the original obligation at the time specified in the contract, such sum is not a penalty, but liquidated damages, the payment of which will be enforced by the courts unless the amount be excessive. *Hardee v. Howard*, 83 Ga. 538.

In *Goldsborough v. Baker*, 3 Cr. C. C. 48, in a contract to deliver a lot of stone, the parties bound themselves each to the other, "to pay in case of failure by either the sum of \$2,000, as stipulated damages, without abatement or diminution:" held a penalty.

In a contract for the carriage of 70,000 staves, the stipulation to "forfeit \$1,000 if we fail to carry out this contract," was held a penalty, 57,000 of the staves having been carried and accepted. *Taylor v. The Marcella*, 1 Woods, 802.

In *Haldeman v. Jennings*, 14 Ark. 329, the defendant contracted to deliver to defendant a lot of staves, for which the plaintiff was to pay him \$400 and make certain advances, and upon failure of either party to perform it was agreed that the failing party should pay the other \$500; held a penalty, because the sum was out of all proportion with the probable actual damage.

In *Hahn v. Horstman*, 13 Bush, 294, it was held as follows: Parties to a contract may agree upon any amount of compensation for its breach as liquidated damages which does not manifestly exceed the amount of injury suffered, and the party in default will be required to pay this fixed sum as an equivalent for the loss sustained. If the actual damage sustained by the party complaining cannot be reached or determined by any known rule of law, then the courts are disposed to look alone to the measure of damage fixed by the contract. But as a general rule, where the actual damage can be ascertained from the contract itself, the courts are always inclined to disregard the language of the contract, so far as it fixes the damage, and particularly in cases where a strict construction of the language used would result in oppression to the party against whom the claim is asserted, by giving the complaining party more damages than he has really sustained. The purchasers of a lot for the purpose of erecting a distillery thereon agreed to pay \$1,800 for it, and as part of the contract of sale the vendor agreed to fill up the lot to a height as marked by an engineer, to fill up an alley, to dig and wall up a reservoir for

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water, etc.; the filling of the lot for the use of the buildings to be completed within twenty-four days, the filling of the balance of the lot within two months, and the filling of the alley within three months from the date of the contract; and upon his failure to complete the work as agreed the vendor agreed to pay as liquidated damages \$30 for each day the work might remain incomplete after the expiration of the agreed time. The vendor completed sixty per cent of the work, and wholly failed as to the remainder. *Held*, that the purchasers are not entitled to the \$30 for each day the work might remain incomplete, but are entitled to recover the reasonable value of the material and labor necessary to complete the work, as the true criterion of damages sustained by them.

In *Trustees First Orthodox Congregational Church v. Walrath*, 37 Mich. 282, the contract sued on was a building contract containing many mutual conditions and stipulations as to time and manner of doing various parts and items of work, as well as in regard to payments. It ended as follows: "And for due time and faithful performance of all and every of the covenants and agreements above mentioned, the parties to these presents bind themselves each unto the other in the penal sum of five hundred dollars, as fixed and settled damages to be paid by the failing party." The court said: "If some particular provisions of the contract had been selected, for the failure to perform which no damages could be computed with reasonable correctness and certainty, and stipulated damages had been fixed for the breach of such provisions, fair and reasonable in amount, perhaps they might have been sustained. But many of the conditions of the contract before us are capable of adequate and exact vindication in pecuniary damages, and most of them could be compensated with very little difficulty. For some breaches of the contract five hundred dollars would be very much below the certain damages in money required for compensation, while for others, as, for example, for delays and variations in performance, it might be an exorbitant allowance. It is impossible to infer that it was deliberately intended that all of these failures to comply with the agreement should be placed on the same footing, and if it had been so intended, the stipulation would be too unreasonable to be enforced."

In *Greer v. Tweed*, 13 Abb. (N. S.) 427, defendant agreed to furnish his biography to plaintiff for publication, within a time fixed, and for every day's delay beyond that time to pay \$165. On a suit to recover for a delay to furnish the biography for 181 days, *held*, that the plaintiff could recover only his actual loss. The court said, the contract was "so extortionate and unjust that it raises the presumption of deceit and fraud in its inception."

But in a building contract, a stipulation for \$10 a day for every day's delay in completing the contract was held valid. *O'Donnell v. Rosenberg*, 14 Abb. (N. S.) 59. And where defendant covenanted in a sealed lease that he would not, before a certain time, negotiate for, accept, or be interested in any lease of certain premises, except from the plaintiff, under a forfeiture of \$10,000, to be paid as liquidated damages and not as a penalty, *held*, that in case of breach of the covenant the plaintiff was entitled to \$10,000 damages.

In *Morris v. McCoy*, 7 Nev. 399, where McCoy covenanted with Morris to pay certain debts of small amount, owing by Morris, and, in case of failure, to pay to Morris \$10,000 as fixed, settled and liquidated damages, *held*, that the sum so named was to be considered a penalty and not liquidated damages, and that in a suit on the covenant the recovery should be limited to the actual damages with legal interest. Also *held*, that where a covenant is such that it secures the performance or omission of various acts, some of which may not be readily measurable by any exact pecuniary standard, together with others in respect of which the damages on the breach of the covenant are certain or readily ascertainable by a jury, any sum therein agreed upon as damages in case of breach will always be held a mere penalty.

In *Henderson v. Cansler*, 79 N. C. 542, two persons whose lands were contiguous had a suit pending about the boundaries thereto, and afterward entered into a bond agreeing to submit all questions arising about the boundaries of said lands to A and B, and to abide by the award made by them, and also in the bond covenanted "that the party who shall fail to keep, abide by, and observe the decision and award that shall be made according to the foregoing submission, will pay to the other the sum of one thousand dollars, as liquidated, fixed, and settled damages." *Held*, that after the award had been made by A and B and one of the parties placed a fence over the dividing line as fixed by the award, and on

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the land of the other, and the damages were not greater than five dollars, the sum specified in the bond was to be regarded as a penalty, and not as liquidated damages.

In *Kemp v. Knickerbocker Ice Co.*, 69 N. Y. 45, a contract for purchase and sale of ice contained a clause by which the plaintiffs agreed to pay one dollar per ton for each ton they failed to take under the contract, and the defendant agreed to forfeit the same sum for each ton it failed to deliver. *Held*, that the sum specified was intended to limit the damages in case of breach. The court observed: "The next question to be determined is the amount of damages which plaintiffs were entitled to recover, and this depends upon the construction of the clause of the contracts *secondly* above set out. The court below held that the one dollar per ton stipulation is a penalty, and does not limit the amount of damages to which plaintiffs were entitled, and allowed them the market price, sixteen dollars per ton less the contract price for every ton not delivered. In this I cannot doubt the court erred. The question whether a sum named in a contract, to be paid for a failure to perform, shall be regarded as stipulated damages, or a penalty, has been frequently before the courts, and has given them much trouble. The cases cannot all be harmonized, and they furnish conspicuous examples of judicial efforts to make for parties wiser and more prudent contracts than they had made for themselves. Courts of law have, in some cases, assumed the functions of courts of equity, and have relieved parties by forced and unnatural constructions from stipulations highly penal. Where an amount, stipulated as liquidated damages, would be grossly in excess of the actual damages, they have leaned to hold it a penalty. Where the actual damages were uncertain and difficult of ascertainment, they have leaned to hold the stipulated amount to have been intended as liquidated damages. No form of words has been regarded as controlling. But the fundamental rule, as often announced, is that the construction of these stipulations depends, in each case, upon the intent of the parties, as evinced by the entire agreement, construed in the light of the circumstances under which it was made. Add. on Cont. 1161: *Main v. King*, 10 Barb. 59; *Richards v. Edick*, 17 id. 266; *Cothcal v. Talmage*, 9 N. Y. 551; *Bigley v. Peidie*, 13 id. 433; *Cutwell v. Lawrence*, 38 id. 71; *Noyes v. Phillips*, 63 id. 438; *Lux v. Whitaker*, 8 Com. Pleas. (L. R.) 70; *Sparrow v. Paris*, 7 H. & N. 594; *Shute v. Taylor*, 5 Metc. 61; *Lynde v. Thompson*, 2 Allen, 456.

"What was here intended by the parties? The one dollar was certainly intended at least to limit the extent of damages to be paid in case of breach, else there could have been no purpose for inserting it; and effect should be given to this intention if it can be consistently with the rules of law. There is nothing decisive in the language used. In case of failure by the plaintiffs they agreed 'to pay' the one dollar; in case of failure by the defendant it agreed 'to forfeit' the same sum. The words 'to pay' and 'to forfeit' were evidently used in the same sense, and might be used in case the sum was intended either as liquidated damages or as a penalty. Considering the length of time these contracts were to run, and the contingencies of the ice trade, and the great fluctuations in the price of ice which might be occasioned by a short supply, it is natural and probable that the parties should desire in advance to fix the amount to be paid for a failure to perform on either side. The damages which would be occasioned by a breach on the part of the defendant would always have to be ascertained by the conflicting evidence and varying judgments of witnesses (*Cothcal v. Talmage*, *supra*), and hence a motive for fixing the amount. This contract was made in reference to the ordinary conditions of the ice trade, and the amount fixed would ordinarily be a reasonable sum to be paid by the failing party. It would always cover any actual loss which the plaintiffs would incur by defendant's failure. In this case the plaintiffs lost nothing by the failure of the defendant except the large profits they could have made if the ice had been delivered at the contract prices. They received the 1,174 tons, and upon that made large profits. They obtained the balance of their supply at the wholesale market prices, and upon that undoubtedly made at least the usual profit, as the retail price, which was at all times under the control of the defendant and other wholesale dealers, was enhanced so as to leave at least the usual margin between the retail and wholesale prices. A construction which would throw the whole loss, serious, if not ruinous, upon the defendant and give the plaintiffs profits about seven times greater than the whole purchase price of the ice, would cause the contracts to operate contrary to the intention of the parties, and should not be adopted unless the language and circumstances of the contracts demand it; and that they do not I think has been sufficiently shown."

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(10 S. C. 110.)

Parent and child — advancement — premiums for life insurance by father for daughter.

A father purchased and paid for a policy of insurance on his own life in the name of his daughter, and for her sole benefit, and paid the annual premiums until his death. *Held*, that the amount of the policy and of the annual premiums after its purchase were advancements.

ACTION by Thomas E. Rickenbacker, administrator of Lewis H. Zimmerman, deceased, and Anna A. Zimmerman, against Ida Zimmerman, Ella Zimmerman and Cornelia Zimmerman.

The intestate in his life-time, on January 24, 1870, after the death of his first wife, and before his second engagement and marriage, insured his life for the sole benefit of his daughter Cornelia, his only child by his first marriage, in the Equitable Life Assurance Society (a corporation chartered under the laws of New York), for the sum of \$4,000, payable upon his death; and then and thereafter paid regularly up to the time of his death an annual premium of \$99.12, on the twenty-fourth day of January in each year, upon the policy for said insurance, making in all five payments, aggregating \$495.60; and on the decease of the said intestate, the general guardian of the infant Cornelia received from the Equitable Life Assurance Society the sum of \$4,111.53, the amount of the said policy and its accumulations.

About the middle of February, 1870, Lewis H. Zimmerman became engaged to, and on October 12, 1870, intermarried with, his second wife, now his widow; and of this marriage the two children, Ida and Ella, were born.

The questions discussed by counsel were whether the said insurance was an advancement by the intestate to his daughter Cornelia, and if so, the value of such advancement. The trial court held that the policy of insurance purchased by the intestate was a substantial provision for the future support and maintenance of his daughter Cornelia, and therefore an advancement, and to be so considered in the distribution of the estate of the said intestate; and that the value of the advancement was the sum named in the

policy of insurance, \$4,000, the excess over that sum paid to the general guardian of Cornelia being the earnings of said policy during her father's life-time.

Defendant, Cornelia Zimmerman, appealed.

Knowlton, for appellant. Amounts paid for or realized under a policy of life insurance are not subject to the law regarding advancements. The finding that the intestate "insured his life for the sole benefit" of the appellant does not, when connected with the statement in the policy that the premiums were paid and payable by the appellant, raise any presumption that such payments were made by the father *a suis*, but, on the contrary, raises the absolute legal presumption that the money paid was the daughter's. *Millspaugh v. Putnam*, 16 Abb. Pr. 380; *Bogert v. Morse*, 1 N. Y. 877.

Izlar & Dibble, contra.

McIVER, A. J. On the 24th January, 1870, the intestate insured his life for the sole benefit of his daughter Cornelia, and having subsequently married a second time, died intestate on the 12th March, 1874, leaving as his heirs at law and distributees, his widow and two children of his last marriage, Ida and Ella, together with the appellant, Cornelia. Under proceedings for partition and settlement of his estate two questions arose: 1. Whether such insurance was an advancement to the appellant. 2. If so, how should such advancement be valued. The Circuit judge held that the insurance was an advancement, and that the value of the advancement was the sum named in the policy and received by the guardian of appellant. From this decision the appeal is taken.

In the absence of any direct authority upon these points, these questions must be determined upon the general principles regulating the law in respect to advancements, aided by such analogies as may be afforded by the decided cases.

In 1 Bouv. Law Dic. 76, the term "advancement" is defined to be "that which is given by a father to his child or presumptive heir by anticipation of what he might inherit." In *McCaw v. Blowit*, 2 McC. Ch. 91, the leading case on the subject of advancements in this State, no definition of the term is given in the decision of the Court of Appeals, but in the Circuit decree it is defined to be "such a part of a man's estate as he gives to a child on marriage,

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or on setting out in life, which may be necessary for its settling in the world."

In the argument of this case the counsel for the appellant, who afterward became one of the most eminent chancellors of this State, questions the correctness of this definition, and says: "If a definition may be ventured, an advancement is the gift of a parent to a child beyond what by law he is bound to provide, from which a substantial benefit is to be derived by the child."

But after long experience on the bench, this distinguished judge seems to have reached the conclusion that it was not an easy matter to frame an accurate definition of the term. *Murrell v. Murrell*, 2 Strobb. Eq. 151. While, however, it is a difficult matter to frame such a definition as will cover every possible case, there are certain essential elements which every advancement must possess, one of which is that it must once have been a part of the ancestor's estate, which, upon his death, would descend to his heirs but for the fact that it has, by the act of the ancestor in making the gift, been separated from or taken out of his estate, or it must be something which is purchased with the funds of the father in the name and for the benefit of the child.

This is obvious from the very terms of our act of 1791 (corresponding with the terms of section 7, chapter 85, General Stat., p. 440), as construed by the case of *McCaw v. Blewit*, *supra*; and, as JOHNSTON, Ch., says in *Ison v. Ison*, 5 Rich. Eq. 19, "an advancement always embraces the idea that the parent has parted from his title in the subject advanced." Even the case of *Clark v. Wilson*, 27 Md. 693, which is much relied on by the respondents, recognizes this idea, for in that case it is said: "An advancement is a giving by anticipation the whole or a part of what it is supposed a child will be entitled to on the death of the party making it and intestate," evidently implying that it must be a part of the ancestor's estate of which the child would be entitled to inherit a part in case of intestacy. So too in *Miller's Appeal*, 31 Penn. 338, an advancement is said to be "a pure and irrevocable gift by a parent, in his life-time, to his child, on account of such child's share of the estate after the parent's decease." And in *Dilman v. Cox*, 23 Ind. 442, it is said: "The true notion of an advancement is a giving by anticipation the whole or a part of what it is supposed a child will be entitled to on the death of the parent or party making the advancement."

If, then, one of the distinguishing features of an advancement is that it must once have been a part of the ancestor's estate, which, but for the gift by way of advancement, would descend to his heirs, the next question to be considered is whether this policy of insurance or the money secured by it ever constituted any portion of the intestate's estate. The finding of fact by the Circuit judge is that "the intestate in his life-time * * * insured his life for the sole benefit of his daughter, Cornelia, * * * for the sum of \$4,000, payable upon his death, and then and thereafter paid regularly up to the time of his death an annual premium of \$99.12," etc.

The policy recites that the first premium was paid by the said Cornelia, and upon what evidence, if any, the Circuit judge based his finding contradictory of this recital does not appear. Assuming, however, as we must do, the correctness of the finding of the Circuit judge, inasmuch as in the case agreed upon he says, after stating the facts as found by him, that "concerning the foregoing facts there was no dispute," the inquiry is whether this policy or the money secured by it ever constituted any part of the intestate's estate which, in any event, could have descended to and become distributable amongst his heirs and distributees, or which he could, by his will, have given to one or more of them. The authorities leave us in no doubt upon this point.

In Bliss on Life Insurance, § 317, it is said the rule is "that a policy and the money to become due under it belong, *the moment it is issued*, to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his or hers, by deed or by will, to transfer to any other person the interest of the person named." Again, at section 328, the writer says: "Payment of the premium without any contract with the person entitled to the benefit of the policy gives no title to it." And again, at section 339, it is said: "Where the policy designates a person to whom the insurance money is to be paid the persons who procures the insurance, and who continues to pay the premiums has no authority, by will or deed, to change the designation or title to the money. He is under no obligation to continue to pay the premiums unless he has covenanted so to do; but if he does so, the person originally designated in the policy will derive the benefit."

To the same effect, see May on Insurance, p. 447, § 392.

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The cases which were principally relied upon by the respondents do not, in our opinion, conflict with these views. The case of *Edwards v. Freeman*, 2 P. Wms. 435, was this: Richard Freeman, in contemplation of marriage with his first wife, Elizabeth, by articles, covenanted with the father of Elizabeth, in consideration of the marriage and of a marriage portion of £5,000, to settle certain lands to the use of himself for life, remainder to said Elizabeth, remainder to his first and other sons in tail male successively, remainder to trustees for five hundred years to raise portions for the daughters of the marriage, payable at eighteen or marriage, and to raise maintenance for such daughters, until their portions became payable, of £80 per annum. The marriage having been consummated and the only issue being one daughter, and Elizabeth dying, Richard Freeman married again and died intestate, leaving a widow and two children of the last marriage and the daughter of the first marriage. The question was whether the provision for the daughter of the first marriage could be regarded as an advancement. *Held*, that the £5,000 portion was an advancement, but not the annual provision for maintenance. The difference between that case and the one now before the court is, that there the gift was of a portion of the intestate's estate, while here the sum of money secured by the policy never did constitute any part of the intestate's estate. For as the master of the rolls says in that case, "the present case comes nearer to land than if it had been a charge out of land; for the trust of the five hundred years' term being only to raise this £5,000 portion, and the plaintiff, Mary Edwards, being the person who is alone entitled to it, she, as to this purpose, is in effect the owner of the five hundred years' term."

It was, therefore, practically a gift to the daughter of a lease for five hundred years of the lands specified; that is, it was a gift of a portion of the intestate's estate. *Kircudbright v. Kircudbright*, 8 Ves. 51, was a case in which a father gave a bond to his son to secure the payment of a certain annuity until his son should be in possession of a living of a certain annual value, and by an agreement of the same date the son covenanted that he would forthwith enter into holy orders and accept such living. The father paid the annuity regularly for nine years, but the son failed to take orders and qualify himself for a living, and upon the death of the father intestate the question arose whether this annuity could be regarded as an advancement, and if so, at what value it should be charged.

Lord ELDON, after expressing some doubt as to the legality of the transaction as being contrary to public policy, decided that the son having failed to comply with the condition for nine years, the annuity was determinable by the father or his representatives, and that while it should be regarded as an advancement, it was a very doubtful question as to how it should be valued, and finally, gave the son the option to have it valued at the date of the grant or to estimate its value by the amount of the payments made under it. Beside the fact that the very doubtful terms in which this decision was made deprives this case of much of the weight which it would otherwise possess, it may be remarked that here, too, the advancement was practically of a portion of the intestate's estate — the annuity being a charge upon that estate. It was also held in this case that a commission in the army, which the father had purchased for another son, was an advancement, to be valued at the sum paid for it, of which we will speak hereafter.

If then this policy of insurance never constituted any part of the estate of the intestate, the next inquiry is, was it something purchased for the child with the funds of the father, and if so, how and when is its value to be estimated. Assuming that the finding of fact by the Circuit judge is correct, then it follows that this policy of insurance does possess this distinguishing feature of an advancement, viz., that it was a thing purchased with the funds of the father in the name and for the benefit of the child. The thing purchased being the policy of insurance, and the purchase having been made and the gift completed the moment it was issued, as we have seen above, that is as soon as the first premium was paid, the only remaining inquiry is how and when is its value to be ascertained. Our act of 1791, differing in this respect from the statute of 22 and 23 Charles II, fixes this beyond dispute by declaring that such value shall be "estimated at the death of the ancestor, but so as that neither the improvement of the real estate by such child or children nor the increase of the personal property, shall be taken into the computation," or as it is stated in the leading case of *McCaw v. Blewit, supra*, in order to ascertain the amount at which an advancement is to be charged, it "is to be estimated at what it is worth at the time of the death, relation being had to its situation at the time of the gift." The advancement or thing given being the policy of insurance, and the time of the gift being the moment it was issued, to ascertain its value, ac-

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According to the rule established by our statute as construed by our courts, the inquiry is, not what it cost, as was held in *Kircudbright v. Kircudbright*, under the English statute, in reference to the commission in the army, because that is not in accordance with the rule as established by our statute, for as is said by JOHNSTON, Ch., in *Cooner v. May*, 3 Strobb. Eq. 189, "it is not the sum expended but the thing which is bought with it — the thing received by the child — which constitutes the advancement; nor is the cost of the purchase the measure of the value of the thing advanced"; but the inquiry is, what a policy for a like amount, upon which the first premium had been paid, on the life of a person, with like expectation of life and of the same age as the father of appellant was when this policy was issued, be worth on the 12th March, 1874, the date of intestate's death.

It is true that it is stated that by one of the regulations of the company issuing this policy a policy drawn in favor of a minor child, as this was, is "neither purchasable nor assignable." But without stopping to inquire whether such a regulation, not incorporated in or forming a part of the policy, which is the contract between the parties, could abridge the rights of the holder of the policy, it is sufficient to say that the inquiry should be what would *such* a policy be worth at the date of the death of the intestate in the condition in which this one was at the time when it was issued, that being the time when the gift was made. If however, from any cause, it should appear to be of no value, then the result would be that it was no advancement.

The question as to the payment by the father of the premiums subsequent to the first presents more difficulty; but we are inclined to regard them as advancements of so much money; like the case of a father, who, after having given his child a piece of property — a residence, for example — expends considerable sums of money from year to year in making improvements or additions to the buildings. In such a case the thing given is the money expended; and while it is true that ordinarily the sum expended does not furnish the rule for estimating the value of an advancement, yet where, as in this case, the thing given is money, there is no other mode of estimating its value except by the amount given.

The suggestion in the argument of respondents that the premiums paid might exceed the amount received on the policy, or that the whole might be lost by the failure of the insurance company,

loses all its force in view of the decisions holding that the child is chargeable with the value of the advancement even though the thing constituting the advancement had ceased to be property before the settlement is made, as in cases of advancements in slaves. *Manning v. Manning*, 12 Rich. Eq. 428; *McLure v. Steele*, 14 id. 115.

So that we think the advancement in this case was, first, the policy of insurance, the value of which is to be ascertained in the manner above indicated, that being the thing which was purchased with the first premium, and that all subsequent premiums were advancements of so much money, which of course will bear no interest except from the time of the death of the intestate.

The authorities relied upon to show that the true value of the advancement in this case was the amount of money received by the child, do not, in our opinion, sustain such a position, inasmuch as these cases are from States where the statutes of distributions are not like ours, and the decisions were made to turn upon the phraseology of the respective statutes.

In *Clark v. Wilson*, 27 Md. 693, a father made a deed of trust of certain lands for the benefit of his children of the first marriage, reserving a life estate to himself. The questions were, first, whether the property conveyed by the deed of trust was an advancement, and second, if so, whether it should be valued at the date of the deed or at the date of the father's death. It was held that the property was an advancement, and that it should be valued at the date of the father's death, when the life estate fell in and the remainder took effect, or when the children received possession of the property.

The case turned upon the language of the Maryland statutes. "The value thereof at the time such advancement was received" — the court construing those words to mean when the property actually goes into the possession of the child.

The case of *Wilks v. Green*, 14 Ala. 443, was this: A father made a deed of slaves to his children, reserving a life estate to himself, and the same questions arose. The court, basing its decision upon the language of the Alabama statute, which provides that the value of the property constituting the advancement shall be fixed "at the time it was delivered," held that the children were chargeable with the value of the property at the time they came to the actual possession of it.

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In *Hook v. Hook*, 13 B. Monr. 528, a father conveyed to certain of his children certain lands and slaves, reserving a life estate to himself. The Kentucky statute provided that "all advancements should be estimated at their value when made," and the court held that the advancement should be deemed to have been made at the time the advancement is "made complete by the actual possession and enjoyment of it." These cases, besides resting upon the particular phraseology of the several statutes of the several States in which they were decided, differ materially from the one now before the court. In each of them the property constituting the advancement was a part of the father's estate, *and continued in his use and enjoyment and under his control up to the time of his death*, while in the case now under consideration the policy of insurance was never a part of the father's estate, and was never in his own use or under his control. The case of *Meadows v. Meadows*, 11 Ired. 148, is likewise relied upon. That case, however, turned upon the special provisions of the North Carolina statute, and throws no light upon the questions we are considering. Many of the cases from other States cited in the argument hold that the question of advancement is one of intention, but such does not seem to be the rule in this State.

In *Rees v. Rees*, 11 Rich. Eq. 86, it was held that whether property given by a parent to a child shall be considered as an advancement is not a question of intention. It is very true that what is or is not an advancement may depend upon the circumstances or condition of the parties, as in *McCaw v. Blewit*, 2 McC. Ch. 91; *Murrell v. Murrell*, 2 Strobb. Eq. 148, and *Ison v. Ison*, 5 Rich. Eq. 15; "but the mere declarations of the donor cannot alter the operation of the law, either as to the character of the gift or even the mode of valuation."

The judgment of the Circuit Court is, so far as it conflicts with the principles herein announced, set aside and the cause remanded for further proceedings in accordance with the principles herein established.

WILLARD, O. J., and HASKELL, A. J., concurred.

Reversed and remanded.

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(10 S. C. 133.)

Interest after maturity.

A contract to pay a sum certain at a future day, with interest at a conventional rate, nothing being said as to the rate of interest after the principal sum becomes due, bears interest at the conventional rate until it becomes due, and from that time, upon the aggregate of principal and interest, at the legal rate. (*See note, p. 47.*)

ACTION on a sealed note dated January 1, 1871, payable twelve months after date, "with interest from date at the rate of twelve per cent per annum." The opinion states the other facts. Judgment was rendered for twelve per cent interest after maturity and up to judgment. Defendant appealed.

Thomson, for appellant.

Duncan & Cleveland, contra.

WILLARD, C. J. This is an action on a sealed note, tried by the court by consent of parties. The credits of the note were admitted and no defense made. The court gave judgment for the amount due, with interest at the rate fixed by the contract, viz., twelve per cent per annum to the day of judgment. The defendant appeals from the allowance of twelve per cent interest, and also on the ground that there were no finding of fact and law. As there was no contest as to the facts, no finding of fact was necessary, and the order for judgment is a sufficient finding of the law.

The note contains a promise to pay a sum certain at twelve months from date, "with interest at the rate of twelve per cent per annum." This contract must be construed as calling for interest at that rate until its maturity.

No contract appears intended to govern the rate of interest from and after the maturity of the note, consequently the damages for non-payment at maturity are governed by the rule of law fixing such damage at interest at seven per cent. *Langston v. South Carolina Railroad*, 2 S. C. 248. The court, therefore, erred in allowing interest at the rate of twelve per cent after the maturity

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of the note. The proper allowance was at the rate of seven per cent from that time.

The judgment is erroneous and must be set aside, unless the plaintiff remits the excess of interest thus charged; and on such remission being made, the judgment, as amended, will stand affirmed, but with costs of this appeal to the appellant.

The case will be remanded to the Circuit Court for further proceedings, in conformity with the foregoing decision.

McIVER, A. J., and HASKELL, A. J., concurred.

NOTE BY THE REPORTER—The subject of this case has been carefully considered in a recent article in the *ALBANY LAW JOURNAL*, vol. 20, p. 480, by William Henry Arnoux, Esq., of New York. We subjoin the article as an excellent summary:

In *Cook v. Fowler*, L. R., 7 H. L. 27, decided in 1874, where an action was brought on a warrant of attorney given to secure the payment of £1,830 "on the 2d of June next, with interest at five per cent per month," judgment to be entered up forthwith, the House of Lords held that the legal rate governed after maturity. Lord Chancellor CAIRNS, Lord CHELMSFORD and Lord HATHERLEY, *seriatim*, delivered opinions. Following them Lord SELBORNE said: "Unless it can be laid down as a general rule of law that upon a contract for the payment of money borrowed for a fixed period, on a day certain, with interest at a certain rate down to that day, a further contract for the continuance of the same rate of interest after that day until actual payment, is to be implied, the decision of the vice-chancellor is not erroneous. I entirely agree with those of your lordships who have preceded me, that no such contract is to be implied unless there is something to justify it upon the construction of the words of the particular instrument."

In accordance with this decision, Byles on Bills, 6th London edition, 240, original paging, lays down the law thus: "Interest *when not made payable on the face of the instrument* is in the nature of damages for the retention of the principal. But in an action of debt, if the instrument be payable by the terms of the instrument, it is recoverable, not as damages, but as debt."

The same doctrine has been announced by the Supreme Court of the United States. In *Brewster v. Wakefield*, 23 How. 118, a note was payable at a future day with interest at two per cent a month, nothing was said about the rate of interest after maturity; the court held that after maturity the note drew only the statutory rate. Mr. Chief Justice TANEY, delivering the opinion of the court, says that when the note is entirely silent as to the rate of interest thereafter, if it is not paid at maturity the creditor is entitled to interest after that time by operation of law and not by virtue of any promise that the debtor has made; that if the right to interest depended upon the contract, the holder would be entitled to no interest whatever after the date of payment. See, also, *Burnhisel v. Firman*, 23 Wall. 170.

In Maine the same question arose on a note payable at a future day with interest at eight per cent. In *Eaton v. Boissonault*, 67 Me. 540; 24 Am. Rep. 52, the court held that such obligations after maturity draw interest only at the statutory rate, unless the special rate is expressly agreed to be paid after maturity.

In Rhode Island, in *Pearce v. Hennessy*, 10 R. I. 233, this rule has been followed. The court say that if the parties to the note or other contract for the payment of money intend that it shall carry the stipulated rate of interest till paid, they can easily entitle themselves to it by saying so in so many words.

In Connecticut, in 1872, it was "lawful to contract for payment or receipt of any rate of interest," providing that only six per cent should be recovered, unless a greater rate should be agreed upon. In 1873 it was enacted that no greater rate of interest than seven per cent per annum should be recovered or allowed for the time after the money loaned became due. In *Suffield Eccl. Soc. v. Loomis*, 42 Conn. 570, the note was payable in three years after date, with no contract for interest after maturity. The contract rate was above the

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legal rate after the note fell due. The court held that the plaintiff could recover, after maturity, only the legal rate of interest.

In Pennsylvania a case arose where the agreed interest was less than the statutory interest. A note was made payable at a future day with interest at the rate of three per cent per annum, and nothing was said about the rate of interest thereafter. It was held in *Ludwick v. Huntzinger*, 5 Watts & Serg. 51, that if such an obligation was not paid at maturity it will draw the interest named till maturity, and after that the usual or statutory rate.

In South Carolina a legacy was made payable at a certain date with five per cent interest, and the court held, in accordance with Pennsylvania decision, that it bore legal rate after maturity. *Henderson v. Laurens*, 2 Dess. (S. C.) 170.

In Alabama the decisions have accorded with the foregoing. See *Henry v. Thompson*, 1 Minor (Ala.), 209; *Kitchen v. Branch Bank of Mobile*, 14 Ala. 288.

On the other hand, in Massachusetts, in a recent case, the court held that when a recovery is had upon a note bearing ten per cent interest, the plaintiff is entitled to interest at the same rate till the time of verdict. *Brannon v. Hursell*, 112 Mass. 63. The reason given is that "the plaintiff recovers interest both before and after the note matures, by virtue of the contract, as an incident or part of the debt, and is entitled to the rate fixed by contract." Judge WALTON delivering the opinion in the Maine case above cited, commenting on this decision, says: "This reasoning is at variance with the reasoning of the House of Lords, with the reasoning of the Supreme Court of the United States, and with the reasoning of the Massachusetts court itself in *Ayer v. Tilden*, 15 Gray, 178."

In Virginia, a sealed note payable at a future day with twelve per cent interest was lawfully made. Subsequently the general rate was fixed by legislation at six per cent. The court held in *Cecil v. Hicks*, 29 Gratt. 1; 26 Am. Rep. 391, that the "contract ought to be construed precisely as if the words 'till paid' had been inserted therein after the words 'from date,' and that such was their obvious meaning," and gave judgment for the rate agreed upon. In the opinion no case outside of the Virginia reports is cited.

In Mississippi the law provided: "No greater rate of interest than six per cent shall be received on any contract or obligation, unless" otherwise agreed upon. Code, 1944. In *Overton v. Bolton*, 9 Heisk. (Tenn.) 762; 24 Am. Rep. 367, this statute was under consideration in an action on a note payable at a future date with twelve per cent interest, and the court held that the note bore the conventional and not the statutory rate both before and after maturity. After reviewing several of the cases holding the contrary view, the court say that the views they hold are based "upon much stronger and better reasons, and reasons, too, which approximate more nearly and more naturally the obvious intention of the parties contracting."

In Texas, in the case of *Pridgen v. Andrews*, 7 Tex. 461, it was held that a note payable on or before a future date, with interest at ten per cent, carried conventional interest until judgment. This doctrine was extended to the time of payment in *Hopkins v. Crittenden*, 10 Tex. 189, on the construction of its interest law fixing the rate "when no specific premium or rate of interest is expressed." Dig., art. 1607, a rate being expressed in the note.

In Wisconsin, in *Spencer v. Maxfield*, 16 Wis. 178, it was held that "where a party has given his obligation for the payment of a sum of money by a certain day with interest at a higher rate than that allowed by law, in the absence of any agreement on that subject such higher rate of interest will continue not only until the money is due, but so long as it is held or detained by the debtor, though such obligation is entirely silent as to the rate of interest after its maturity." This decision was approved and followed in *Pruyn v. City of Milwaukee*, 18 Wis. 367.

In Illinois, Judge BRESSE, in *Etnyre v. McDaniel*, 28 Ill. 201, reviews the authorities and holds that "conventional, not legal interest, was the contract to attach to the debt until it should be fully paid, and so long as it remains a note."

In Iowa two cases came before the Supreme Court, in each of which the court below had allowed statutory interest only from maturity of the obligation sued upon, and the judgments were reversed. *Hand v. Armstrong*, 18 Iowa, 824; *Thompson v. Pickel*,

Briggs v. Winsmith.

22 Id. 420. In the first cited case the court expressly disapprove of the decision in 22 How. (U. S.) 118.

In California the same doctrine has been announced, but the case decided, *Kohler v. Smith*, 2 Cal. 597, turns entirely upon the language of the statute, and does not aid in any general construction of the question.

In Nevada, in *Cox v. Smith*, 1 Nev. 161. and *McLane v. Abrams*, 2 Id. 199, the same result is reached for the same reason, although the court hold, "after breach, in the absence of a continuing contract as to interest, the statute fixes the damages to be recovered." Chief Justice LEWIS delivering the opinion, after citing 22 How. (U. S.) 118, and other authorities on the same side, says: "To the correctness of these decisions under the statutes upon which they were made we give our ready assent."

It will, therefore, be observed that England, the United States courts, Maine, Rhode Island, Connecticut, Pennsylvania, South Carolina and Alabama have decided in favor of the statutory rate. Massachusetts, Virginia, Mississippi, Texas, Illinois, Wisconsin and Iowa have decided in favor of the contract rate. California and Nevada do not count.

The question has been before our own courts, but we imagine not in a manner to make the decision one that will bind the Court of Appeals as *stare decisis*.

In *Miller v. Burroughs*, 4 Johns. Ch. 436, where the contract allowed six per cent, in a *per curiam* opinion the court held that "interest must be decreed according to the contract of the parties until the contract ceases to operate by being merged in the decree." This decision is cited approved in *Van Buren v. Van Gaasbeck*, 4 Cow. 496.

An action was brought by the *United States Bank v. Chapin* upon two promissory notes, the clerk of the court in assessing damages computed the rate of interest at seven per cent after maturity. A motion was thereupon made to set aside the assessment of the clerk, and the motion was denied, "the court holding that the clause in the charter of the bank limiting the rate of interest to six per cent referred only to discounts in the ordinary course of business; that the contract with the bank having been broken, the defendant was liable to pay the rate of interest fixed by the *lex loci* from the time that the debt became due." 9 Wend. 471. And see, also, the decision on a motion made to correct the judgment for an error in omitting part of the interest where the question was raised whether the interest should be six or seven per cent, in *Mechanics' Bank v. Minthorne*, 19 Johns. 244. To the same effect is *Macomber v. Dunham*, 8 Wend. 560.

This question has been before the Court of Appeals in a case where it was not necessary to make any determination, and FOLGER, J., delivering the opinion in *Ritter v. Phillips*, 53 N. Y. 590, after citing the contrary decisions on the subject in this State, says: "It is not necessary now to determine which of these sets of cases declares the law correctly."

So it remains with us an open question. See, also, *Paine v. Cancell*, 68 Me. 80; s. c., 28 Am. Rep. 21.

We may add to Mr. Arnoux's summary that the vexed question was hinted at in *Wilson v. Cobb*, 4 Stew. 91. It was there held that where an account extending over a number of years was ordered, and the rate of interest during that time had been changed by law, the interest on such accounting must conform to such fluctuations. The chancellor said: "By the judgment of the Court of Errors and Appeals the defendants are to be required to account for half of the proceeds of the sale (subject to a certain deduction) of certain railroad bonds, with interest from June 21, 1864, and the question is as to the rate of interest. The judgment was pronounced in March term, 1878. The lawful rate of interest was then seven per cent per annum, but it was changed to six by a law which took effect on the 4th of July following. A contract for the payment of money made before July 4, 1878, on which interest at the rate of seven per cent per annum was lawfully payable by its terms, would still bear interest at that rate until the money be paid, or until judgment or decree, notwithstanding the change in the lawful rate, and even though the contract matured before the change took effect." (This remark is plainly *obiter*.) "A judgment or decree entered upon it since that change would, however, bear interest only at the legal rate of six per cent. *Wilson v. Marsh*, 2 Beas. 289; *Verree v. Hughes*, 6 Halst. 89; *Cox v. Mariatt*, 9 Vroom, 369. Where interest is given by way of damages for the detention of a

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debt, it will be allowed according to the legal rate for the time being; and if there have been changes it will vary from time to time during the period for which interest is allowed, according to the changes. *Marcy's Account*, 9 C. E. Green, 451." Mr. Stewart has appended a valuable note on this topic to his report of this case.

In *Holden v. Freedman Savings and Trust Co.*, decided by the United States Supreme Court at October term, 1879, the question is discussed. This case arose in the District of Columbia, where the statutory rate is six per cent, but parties are permitted to stipulate for a different rate not exceeding ten per cent, and the note was at ten per cent, saying nothing about interest after maturity. The court said:

"The rule heretofore applied by this court, under the circumstances of this case, has been to give the contract rate up to the maturity of the contract and thereafter the rate prescribed for cases where the parties themselves have fixed no rate. *Brewster v. Wakefield*, 22 How. 118; *Bernhizel v. Furman*, 28 Wall. 170. Where a different rule has been established it governs, of course, in that locality. The question is always one of local law. This subject was fully examined in the recent case in this court of *Cromwell v. County of Sac*, 94 U. S. 351. We need not go over the same ground again. Here the agreement of the parties extends no further than to the time fixed for the payment of the principal. As to every thing beyond that it is silent. If payment be not made when the money becomes due, there is a breach of the contract and the creditor is entitled to damages. Where none is agreed upon, the law fixes the amount according to the standard applied in all such cases. It is the legal rate of interest where the parties have agreed upon none. If the parties meant that the contract rate should continue, it would have been easy to say so. In the absence of a stipulation such an intendment cannot be inferred. The analogies relied upon to support a different view are obviously distinguishable from the case in hand."

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(10 S. C. 247.)

Surety — joint — estate of, not discharged by his death before principal.

Where a joint note is executed by a principal, and by a surety not otherwise liable, and the latter dies leaving the principal surviving, his estate is not discharged from the obligation. (*See note, p. 56.*)

ACTION on a promissory note. The opinion states the facts. The plaintiff had judgment below.

Munro & Munro, for appellant.

Johnson, contra.

McIVER, A. J. This was an action on a note, of which the following is a copy:

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“\$100. One day after date we promise to pay A. E. Susong one hundred dollars for value received.

“*February* 10, 1874.

his
“W. H. × VAIDEN.

mark.
“L. G. BISHOP.

“Witness: J. C. HIX.”

The defendant, Vaiden, did not appear, and, therefore, the plaintiff was entitled to judgment against him. The defense set up by the other defendant was that the note being a *joint* note, and L. G. Bishop having signed the same as surety merely, and not being liable for the debt except by reason of such signing, his estate, upon his death, was absolutely discharged, both in law and equity, and the survivor alone was liable.

The survivorship and insolvency of Vaiden, as well as the fact that the note was given for a debt due by Vaiden alone, Bishop being merely a surety, and having received no benefit from the consideration, were admitted. On the trial the Circuit judge charged the jury that the note sued on was in effect a joint and several note, and that the verdict should be for the plaintiff against both defendants, to which charge the appellant excepted. It is obvious that this exception was well taken. We can see no ground whatever to warrant such a charge. Story on Prom. Notes, § 57; 1 Story Eq. Jur., § 164. The note was, upon its face, plainly a joint and not a joint and several note, and there was no evidence whatever to show the contrary, even if such evidence were admissible under the state of the pleadings. The defendant, who is appellant, requested the Circuit judge to charge that a note commencing “we promise to pay” is a joint note if signed by two or more. This the Circuit judge charged, but added the words “under certain circumstances,” to which qualifying words appellant excepted. This also was error; for while there are cases which hold that in equity a note signed by a partnership, commencing “we promise,” is in effect the joint and several note of the several partners, and while there are other cases which hold that an obligation in form joint may, in equity, be shown to have been so drawn by mistake, and that in fact the real intention was that it should be joint and several, yet there was nothing in this case to warrant any such instruction. For in determining the correctness of any propo-

sition of law given to the jury for their guidance, we must necessarily look to the circumstances of the case to determine whether it was right in the particular case submitted. We do not sit here for the purpose of determining mere abstract questions of law, but to decide whether the law, as applicable to a particular case made, has been correctly stated. Indeed, we think that the Circuit judge practically reversed the rule of law, for as we understand it, the rule is that a note signed by two or more, commencing "we promise to pay," is a joint note and not a joint and several note, but that, under certain circumstances, indicated above, such a note may be treated in equity as a joint and several note. The appellant also requested the Circuit judge to charge that, "upon the death of one of the makers of a joint promissory note, who was not liable for the debt irrespective of the joint obligation, but who signed the note simply as surety, his estate is absolutely discharged, both in law and equity, and the survivors only are liable."

The judge charged in accordance with this request, but added "that it had no application to this case," to which additional words appellant excepted. In this also we think there was error. For if, as we have seen, the court below erred in instructing the jury that the note, though in form joint, was in effect joint and several, then the proposition of law involved in this last-mentioned request was not only directly applicable but might be conclusive of the case; because, if such proposition is well founded, then the verdict should have been in favor of the defendant, Bishop. It becomes necessary, then, for us to consider and determine whether such proposition can be maintained; and indeed this was the only question argued here. It must be admitted that this proposition is fully sustained by the authorities outside of this State, a full and fair statement of which will be found in appellant's brief; but on the other hand, the authorities in this State are to the contrary. *Shubrick v. Livingston*, 1 DeS. 322; *Lainhart v. Reilly*, 3 id. 591; *Smith v. Martin*, 4 id. 151.

These cases distinctly hold that upon the death of one of two or more obligors who was a mere surety, while his estate is discharged at law, it is not in equity. This proposition, while not distinctly decided, inasmuch as the direct question did not arise, seems to have met the approbation of NOTT, J., in *Fescot v. Smith*, 1 McC. Ch. 304, and of CHEVES, J., in *Ayer v. Buford*, 2 M. Con. Rep. 321. It is very true that HARPER, Ch., in *Pride v. Boyce*, Rice's Eq. 288,

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does say that "upon an examination of the cases they seem to me to establish a rule of this sort : that if the joint obligation be created merely by the bond or covenant, where there was no previous liability, in that case no relief will be afforded against the estate of the deceased obligor in the event of the insolvency of the survivor. But if there was an antecedent debt to which both parties were liable, as in the case of partners, then the court infers without direct proof that the instrument was made joint by mistake, and relieves accordingly, by setting it up as a joint and several bond ; and on a still stronger equity it should seem that where there was an antecedent debt to which the deceased obligor was solely liable, would the court set it up as his several debt, in favor of the obligee, where the surviving obligor proves insolvent?" This, however, so far as it states the rule as contended for by appellant, was a mere *dictum*, for the question in *Pride v. Boyce* was whether the assets of McCauley's estate could be applied to the payment of a joint note signed by McCauley as principal and Pride as surety, and it was held that they could. Indeed, it can scarcely be called a *dictum* of that distinguished chancellor, for it will be observed that he does not state the rule as one which he approves, but merely as one established by the cases ; and an examination of his opinion shows that the cases from which he deduced his rule are all English cases, and he does not mention or refer to a single one of the cases in our State above cited.

It is argued, however, that the decisions in this State which establish the contrary of the proposition contended for by appellant are all cases on bonds in which the obligors, in terms, bind not only themselves but also their heirs, executors and administrators, while the case now under consideration is an action on a promissory note, by which the makers do not, in terms, bind their heirs, executors and administrators. This is true so far as the form of words go, but in substance and effect the obligation, so far as this point is concerned, is the same under a promissory note as under a bond. In a bond the obligor binds specifically his heirs, executors and administrators, while in a promissory note he does not. But in the case of a bond the obligee can only enforce the obligation as against the heirs to the extent of the value of the land of the obligor which may have descended to him, and as against the executor or administrator to the extent of the value of the assets of the obligor which have or ought to have come into his hands, and

this he can in the case of a promissory note. So that we are at a loss to perceive the practical difference in this respect. We do not, therefore, think that the decisions in this State should be confined to actions on bonds. The court evidently did not rest their decisions upon any such ground, for while that circumstance was adverted to in two of the cases, it is not even mentioned in the third.

Again, it has been urged that in order to bring the law in this State into conformity with the law as declared in other States in the Union, as well as by the Supreme Court of the United States, these decisions should be overruled. To this proposition we have given that careful attention which its gravity demands; but after mature and deliberate consideration, we are unable to give our concurrence to the rule as established elsewhere, and, therefore, we see no reason for disturbing the rule as established by our own decisions. It seems to us that the rule contended for by the appellant had its origin in and rests entirely upon strictly technical doctrines incident to the common-law rules of pleading, which are now no longer of force in this State. We are unable to perceive any good ground growing out of the nature of the rights and duties incident to a joint contract upon which it can rest, though we can readily perceive how it grew up, from the nature of the remedies provided, by the old rules of the pleading. By those rules it was not allowable to bring a joint action at law against a living obligor and the representatives of a deceased co-obligor, for the reason only that the judgment against the survivor would be *de bonis propriis*, while that against the representatives would be *de bonis testatoris*, and the common law did not tolerate a double judgment in one action. That this was purely technical, and that there was no inherent difficulty in the way, is conclusively shown by the practice of the court of equity, and by the practice under the Code of Procedure, under which such judgments have been and are in constant use. By another rule of that system of pleading it was required that where an action was brought upon a joint contract it was necessary that all the living co-contractors should be joined in the action.

These rules lead legitimately to the conclusion that in case of the death of one of two or more joint contractors his representatives were absolutely discharged from any action at law. Then, by the aid of the equity doctrine — that where a surety is not bound at law he will not be made liable in equity — the conclusion was reached that upon the death of one of two or more joint obligors, who is

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liable only as a surety, his estate is absolutely discharged both at law and in equity. The fault of this reasoning, as it seems to us, is to be found in the fact that the distinction between being discharged from suit at law and being discharged from the obligation to perform the contract is lost sight of. There is no difficulty in understanding how, under the common-law rules of pleading, the estate of the deceased co-obligor could not be pursued in an action at law, and how it could be properly said that such estate was discharged from *such action*; but it is not only difficult but absolutely impossible for us to understand how the death of the party can discharge his estate from his obligation to fulfill his contract. The *remedy* at law may have been gone because of the want of proper machinery in that court to put it into practical operation, but the duty to perform the contract still remains — the obligation is not discharged. There is nothing in the nature of the rights and duties growing out of joint contracts which warrants the conclusion that the death of one of the co-contractors destroys the right or discharges the obligation which grows out of such contracts. It is said that the surety by signing a joint contract incurs a *joint liability* and no other. If this be true, carried to its legitimate result, it would necessarily lead to the conclusion that when a joint judgment is recovered upon a joint contract, against two or more obligors, their joint property could alone be made liable, whereas we know the contrary to be well-established law, and that the judgment in such a case may be enforced as well against the separate property of either of the co-obligors as against their joint property. We do not think, therefore, that the authorities which have been relied upon as sustaining the proposition contended for by the appellant, rest upon a satisfactory foundation, and we are unwilling to overrule the decisions in this State establishing the contrary. Indeed, since the adoption of the Code of Procedure, which, in conformity to the requirement of the Constitution, has provided that justice shall be administered in a uniform mode of pleading without distinction between law and equity, we can see no reason why the representatives of a deceased co-obligor, who was a mere surety, may not be joined with the surviving obligor in an action upon a joint bond or note, as in this case.

While, therefore, as we have seen, errors were committed by the Circuit judge in his charge to the jury, we do not regard such errors as material in this case; for upon the principles herein established

this he can in the case of a promissory note. So that we are at a loss to perceive the practical difference in this respect. We do not, therefore, think that the decisions in this State should be confined to actions on bonds. The court evidently did not rest their decisions upon any such ground, for while that circumstance was adverted to in two of the cases, it is not even mentioned in the third.

Again, it has been urged that in order to bring the law in this State into conformity with the law as declared in other States in the Union, as well as by the Supreme Court of the United States, these decisions should be overruled. To this proposition we have given that careful attention which its gravity demands; but after mature and deliberate consideration, we are unable to give our concurrence to the rule as established elsewhere, and, therefore, we see no reason for disturbing the rule as established by our own decisions. It seems to us that the rule contended for by the appellant had its origin in and rests entirely upon strictly technical doctrines incident to the common-law rules of pleading, which are now no longer of force in this State. We are unable to perceive any good ground growing out of the nature of the rights and duties incident to a joint contract upon which it can rest, though we can readily perceive how it grew up, from the nature of the remedies provided, by the old rules of the pleading. By those rules it was not allowable to bring a joint action at law against a living obligor and the representatives of a deceased co-obligor, for the reason only that the judgment against the survivor would be *de bonis propriis*, while that against the representatives would be *de bonis testatoris*, and the common law did not tolerate a double judgment in one action. That this was purely technical, and that there was no inherent difficulty in the way, is conclusively shown by the practice of the court of equity, and by the practice under the Code of Procedure, under which such judgments have been and are in constant use. By another rule of that system of pleading it was required that where an action was brought upon a joint contract it was necessary that all the living co-contractors should be joined in the action.

These rules lead legitimately to the conclusion that in case of the death of one of two or more joint contractors his representatives were absolutely discharged from any action at law. Then, by the aid of the equity doctrine — that where a surety is not bound at law he will not be made liable in equity — the conclusion was reached that upon the death of one of two or more joint obligors, who is

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liable only as a surety, his estate is absolutely discharged both at law and in equity. The fault of this reasoning, as it seems to us, is to be found in the fact that the distinction between being discharged from suit at law and being discharged from the obligation to perform the contract is lost sight of. There is no difficulty in understanding how, under the common-law rules of pleading, the estate of the deceased co-obligor could not be pursued in an action at law, and how it could be properly said that such estate was discharged from *such action*; but it is not only difficult but absolutely impossible for us to understand how the death of the party can discharge his estate from his obligation to fulfill his contract. The *remedy* at law may have been gone because of the want of proper machinery in that court to put it into practical operation, but the duty to perform the contract still remains — the obligation is not discharged. There is nothing in the nature of the rights and duties growing out of joint contracts which warrants the conclusion that the death of one of the co-contractors destroys the right or discharges the obligation which grows out of such contracts. It is said that the surety by signing a joint contract incurs a *joint liability* and no other. If this be true, carried to its legitimate result, it would necessarily lead to the conclusion that when a joint judgment is recovered upon a joint contract, against two or more obligors, their joint property could alone be made liable, whereas we know the contrary to be well-established law, and that the judgment in such a case may be enforced as well against the separate property of either of the co-obligors as against their joint property. We do not think, therefore, that the authorities which have been relied upon as sustaining the proposition contended for by the appellant, rest upon a satisfactory foundation, and we are unwilling to overrule the decisions in this State establishing the contrary. Indeed, since the adoption of the Code of Procedure, which, in conformity to the requirement of the Constitution, has provided that justice shall be administered in a uniform mode of pleading without distinction between law and equity, we can see no reason why the representatives of a deceased co-obligor, who was a mere surety, may not be joined with the surviving obligor in an action upon a joint bond or note, as in this case.

While, therefore, as we have seen, errors were committed by the Circuit judge in his charge to the jury, we do not regard such errors as material in this case; for upon the principles herein established

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the verdict should have been as it was, and we do not, therefore, feel called upon to disturb it because of errors which could not change the result of the case. For as the case made depended exclusively upon the question of law above determined, it was the duty of the Circuit judge to have instructed the jury to find for the plaintiff against both of the defendants; and although the reasons assigned by the Circuit judge for such instruction are not well founded in law, yet as the instruction was right in itself it must be sustained.

The judgment of the Circuit Court is affirmed.

WILLARD, C. J., and HASKELL, A. J., concurred.

Judgment affirmed.

NOTE BY the REPORTER.—From the learned argument of the appellant's counsel, characterized by the court as "a full and fair statement," we extract the following:

Upon the death of one of the makers of a joint note his representatives are, at law, discharged, and the survivor alone can be sued. *Towers v. Miner*, 2 Vern. 96; *Simpson v. Vaughan*, 2 Atk. 81; *Richter v. Poppenhausen*, 42 N. Y. 375; *Boykin v. Watson's Administrators*, 1 Con. St. Tr. 157.

If the joint maker, so dying, be a surety merely, his estate is absolutely discharged, both at law and in equity, the survivor only being liable. *Getty v. Binsee*, 49 N. Y. 385; s. c., 10 Am. Rep. 379; *Pickergill v. Lahens*, 15 Wall. 143; *United States v. Price*, 9 How. 91; *Rawstone v. Parr*, 3 Russ. 424, 539.

In *United States v. Price*, 9 How. 91, the court say: "The obligation of a surety arises only from positive contract. The liability is construed strictly, both at law and in equity, and the liability of the surety cannot be extended by implication beyond the terms of his contract. If he contracts jointly with his principal, it is a legal consequence, known to all parties, that his personal estate will be discharged in case he should die before his principal. Such being the law, it may be considered as part of the written condition of the bond, and equity will not interfere to extend the liability as against his estate on the ground that such discharge arises from the mere technicalities of the law."

In *Getty v. Binsee*, 49 N. Y. 385; s. c., 10 Am. Rep. 379, the court, after saying the survivor is discharged at law, proceed: "It seems to be equally well settled that if the joint obligor, so dying, be a surety, not liable for the debt irrespective of the joint obligation, his estate is absolutely discharged, both at law and in equity, the survivor only being liable. In such case, where the surety owed no debt outside and irrespective of the joint obligation, the contract is the measure and limit of his obligation. He signs a joint contract and incurs a joint liability, and no other. Dying prior to his co-maker, the liability all attaches to the survivor."

In *Rawstone v. Parr*, 3 Russ. 424, 539, creditors claimed to prove a joint note against the estate of a deceased surety, the surviving makers and principals being insolvent. The master of the rolls allowed the claim, but his decree was reversed by the chancellor, Lord LYNDHURST. See, also, notes to *Thomas v. Frazer*, 3 Ves. Jr. 899.

The case of *Pickergill v. Lahens*, 15 Wall. 143, is also directly in point. The court say: "It is very clear that the estate of Lafarge is discharged at law from the payment of the obligation in controversy, on the familiar principle that if one of two joint obligors die the debt is extinguished against his representative, and the surviving obligor is alone chargeable. It is equally clear that in this class of cases where the remedy at law is gone, as a general rule a court of equity will not afford relief, for it is not a principle of equity that every joint covenant shall be treated as if it were joint and several. The court will not vary the legal effect of the instrument by making it several as well as joint, unless it can see, either by independent testimony or from the nature of the transaction itself, that the

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parties concerned intended to create a separate as well as a joint liability. If through fraud, ignorance or mistake, the joint obligation does not express the meaning of the parties, it will be reformed so as to conform to it. This has been done where there has been a previous equity which gives the obligee a right to a several indemnity from each of the obligors, as in the case of money lent to both of them. There a court of equity will enforce the obligation against the representatives of the deceased obligor, although the bond be joint and not several, on the ground that the lending to both creates a moral obligation in both to pay, and that the reasonable presumption is the parties intended their contract to be joint and several, but through fraud, ignorance, mistake or want of skill, failed to accomplish their object. This presumption is never indulged in the case of a mere surety, whose duty is measured alone by the legal force of the bond, and who is under no moral obligation whatever to pay the obligee, independent of his covenant, and consequently there is nothing on which to found an equity for the interposition of a court of chancery. If the surety should die before his principal, his representatives cannot be sued at law, nor will they be charged in equity. The general doctrines on this subject were presented at large in this court in the case of the *United States v. Price*, 9 How. 91, and they are sustained by the text writers and books of record in this country and in England."

The principle is recognized as well settled by the Court of Appeals of South Carolina. Chancellor HARPER, delivering the opinion of the court in the case of *Pride v. Boyce*, Rice's Eq. 288, says: "Upon an examination of the cases, they seem to establish a rule of this sort: That if the joint obligation be created merely by the bond or covenant where there was no previous liability, in that case no relief will be afforded against the estate of the deceased obligor in the event of the insolvency of the survivor; but if there was an antecedent debt to which both parties were liable, as in the case of partners, then the court infers, without direct proof, that the instrument was made joint by mistake, and relieves accordingly, setting it up as a joint and several bond."

The cases in South Carolina are *Executor of Shubrick v. Executor of Livingston*, 1 DeS. 320; *Lainhart v. Administrator of Reilly*, 8 id. 590; *Smith v. Martin*, 4 id. 149. These cases are all upon joint bonds, binding the obligors, their heirs, executors and administrators; but the point was not urged that the estate of the surety was discharged because he was surety, but merely because he was dead. The argument was that the estate of a deceased joint obligor is discharged in equity as well as at law — this without reference to his situation, whether as principal or surety. This will appear from the opinion of the court and the authorities cited by the court and counsel. Not one of the authorities cited by the court or counsel in either of the cases sustains the position that the estate of the surety will be held liable. In the first case, *Shubrick v. Livingston*, two authorities only are cited in the opinion, viz., *Ratliffe v. Graves*, 1 Vern. 198; *Skip v. Huey*, 3 Atk. 91, in both of which the bonds were joint and several, and they were cited on another question. *Simpson v. Vaughan*, 2 Atk. 31; *Bishop v. Church*, 2 Ves. Sr. 100, 371, and *Rivers v. Kennedy*, are cited by counsel. In the case of *Rivers v. Kennedy*, the bond was joint and several. In *Bishop v. Church* the condition of the bond was joint and several, and each of the obligors participated in the consideration. See this case cited in *Hoare v. Contencin*, 1 Brown's C. C. 27; *Rawstone v. Parr*, 3 Russ. 424, 539; *Thomas v. Frazer*, 3 Ves. 399. In *Simpson v. Vaughan* the bond was joint only, but it was given by Nut & Baker, partners, so styled in the bond, for a joint loan, and for that reason the court relieved. But the lord chancellor says "it cannot be laid down as an invariable rule that the court will do it in every case."

In the second case, *Lainhart v. Administrator of Reilly*, two authorities only are cited, viz., *Executors of Shubrick v. Executors of Livingston*, supra, and *Madox v. Jackson*, 3 Atk. 406. In the case of *Madox v. Jackson* the bond was joint and several. Lord THURLOW says in *Hoare v. Contencin*, 1 Br. C. C. 27: "The case in *Atkins*, *Madox v. Jackson*, has nothing to do with it; it is the case of a joint and several bond."

In the third case, *Smith v. Martin*, three cases only are referred to by the court, viz., *Primrose v. Bromley*, *Administrator of Mead*, 1 Atk. 90; *Bishop v. Church*, 2 Ves. Sr. 100, 371; *Thomas v. Frazer*, 3 id. 399. In *Primrose v. Bromley*, Moore, Mead and another were assignees of a bankrupt, and gave bond to account for such sums as they, or either of them, might receive. The lord chancellor held the bond to be several as well as joint. Besides, Mead was a principal, and had received moneys as assignee. As to *Bishop v. Church*, see above. In *Thomas v. Frazer*, the bond was given by John and Walter Ewer, partners.

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and the intention of the parties to be bound severally was admitted. The cases cited by counsel are *Simpson v. Vaughan* and *Madox v. Jackson*, already referred to.

Getty v. Binsse was followed in *Wood v. Fiske*, 63 N. Y. 245; s. c., 20 Am. Rep. 523; *Risley v. Brown*, 67 N. Y. 160; *Davis v. Van Buren*, 73 id. 587.

The contrary doctrine as to a bond was held in *Royal Ins. Co. v. Davies*, 40 Iowa, 469; s. c., 20 Am. Rep. 531.

In *First National Bank of Chittenango v. Morgan*, 73 N. Y. 593, it was held that where the promissory note of a firm is given by one of its members not in the partnership business, and with the consent or knowledge of the other members, for the accommodation of the payee, as to a *bona fide* holder for value, without notice of the actual relation of the parties, the members of the firm are bound as principals, and upon the death of one of them an action may be maintained thereon against his personal representatives upon showing the insolvency of the surviving partner; the rule absolving the estate of a joint surety upon his death is not applicable. *Getty v. Binsse* and *Risley v. Brown* distinguished, on the ground that the plaintiff had no knowledge of the actual relations of the parties.

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(10 S. C. 453.)

Chattel mortgage of crop to be planted.

A contract in writing, dated in December, by which a debtor, in consideration of indulgence, gave to his creditor "a mortgage on all my [his] cotton, corn and wheat that I may raise during the then next year, to secure the payment of the debt; and in default of payment by the 1st of November next, then I authorize the said" creditor or his agent to "take all the crops raised by me." *Held*, a good and enforceable lien upon the crops mentioned therein, although they had not been planted when the contract was made, the mortgagee having taken the property into his possession after it is acquired and before the rights of others as creditors or purchasers have attached thereon. (See note, p. 63 .)

ACTION to recover the possession of personal property. The opinion states the facts. The defendant had judgment below.

Harrison, for appellant.

Murray & Murray, contra.

McIVER, A. J. This was an action brought in a trial justice's court to recover the possession of certain personal property. The trial justice rendered judgment for the plaintiff, and upon appeal to the Circuit Court, his judgment was sustained by that court.

The facts of the case, as we learn them from the statement made by the respondent and conceded by the appellant, were as follows :

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Moore cultivated land of Byrum in the year 1875, and at the end of the year, having fallen in debt to him, Byrum refused to permit Moore to remove the portion of the crop to which he was entitled unless he would secure his debt by executing the note and agreement hereinafter mentioned, whereupon Moore, on the 4th of December, 1875, executed his note under seal, whereby he promised to pay the defendant, Byrum, on or before the 1st of November next after the date of said note, thirty-two 50-100 dollars, and to secure the payment of such note, executed a paper of which the following is a copy :

*"Know all men by these presents, That I, C. A. Moore, * * ** do hereby give to Joseph Byrum, Jr., a mortgage on all my cotton, corn and wheat that I may raise during the year 1876, to secure the payment of the above note this day given by me ; and in default of payment by the 1st of November next, then I authorize the said Byrum to take all the crops raised by me, or any other person he may select so to do."

The crops mentioned in the foregoing paper were not planted at the time the same was given and were not raised on lands of the appellant. The note not having been paid at maturity, the defendant, Byrum, obtained from the clerk of the Court of Common Pleas a warrant, under the provisions of the act entitled "An act to secure advances for agricultural purposes," directed to the defendant, McGukin, as sheriff, under which he seized the cotton and other crops of the plaintiff ; whereupon this action was commenced to secure possession of the same. At the trial, the defendants abandoned any claim to hold the property under the warrant issued by the clerk, for the reason, as it would seem from the report of the trial justice, that the debt intended to be secured was an antecedent debt, and did not arise from advances made at the time or after the execution of the agreement, but claimed that the agreement, although not effectual as an agricultural lien under the statute, was good as a mortgage, and that the taking of the property was justified under the provisions of such paper as a mortgage.

The trial justice instructed the jury before whom the case was tried "that a mortgage on personal property not in being was invalid as a mortgage, and that, if they believed from the testimony that the crop was not planted at the time of the agreement, then it was wholly invalid as a mortgage"; and further, "that no evidence had been produced the legal effect of which was to estop the plaintiff."

To all these rulings the defendant excepted. The grounds upon which the Circuit judge rested his decision are not stated, as he simply dismisses the appeal and renders judgment for the plaintiff; from which we must infer that he adopted the rulings of the trial justice, and for this reason we have stated them. It would seem, therefore, that the agreement was regarded both by the Circuit judge and by the trial justice as intended by the parties as a mortgage, though the defendants did at one time treat it as if it were also an agricultural lien under the statute. There can be no doubt that a paper, whatever may be its form, will, if intended by the parties as a mortgage, be so regarded by a court of equity (*Walling v. Aikin*, McM. Eq. 1), and we have as little doubt that the parties in this case did intend the paper here in question to be a mortgage, as it is so distinctly called in the body of the paper, and contains a provision, usually found in mortgages of personal property, authorizing the mortgagee, either by himself or by his agent, to seize the property mortgaged upon default in payment of the mortgage debt. The fact that Byrum at one time seemed to regard it as a lien under the statute does not negative this idea, for we know it is frequently the case that papers of this kind are so drawn as to give them both characters. Nor do we think that this can be controlled by the decision in the case of *Green v. Jacobs*, 5 S. C. 280, for two reasons: First, Because that was a case in which the rights of third persons had intervened, while in this case the contest is between the original parties. Second, Because in that case there was no provision in the paper authorizing the mortgagee to take possession of the property mortgaged upon default in payment of the debt, while in this case there is such a provision.

This, it will be remembered, is an action to recover possession of personal property; it is not an action to recover damages for a trespass in unlawfully seizing property in the possession of the plaintiff. But the action, if maintainable at all, must be maintained upon the ground that the property in question belongs to the plaintiff, or that, as against the defendants, he is entitled to the possession of it. If therefore the paper under which the defendants seek to protect themselves can be regarded as having the effect of a mortgage, then clearly the plaintiff cannot maintain this action. It is argued, however, that this paper cannot be regarded as a mortgage because at the time it was executed the property intended to be mortgaged had neither an actual or a potential

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existence, inasmuch as it is admitted that the crops had not then been planted and were not afterward raised on land of appellant which he then held either in his own right or as tenant of another. The authorities cited in respondent's brief do show that in order to create a valid mortgage, the thing intended to be mortgaged must be at the time either in actual existence or it must be the prospective yield of something which has been in actual existence. But where there is a mortgage on property to be subsequently acquired, although the mortgage is not valid or effectual at the time when it is given, yet after the property is acquired and is taken into possession under the mortgage by the mortgagee the right to the property passes from the mortgagor to the mortgagee. Unquestionably is this so where, as in the case now under consideration, the rights of third persons, either as creditors or purchasers, have not intervened and where the controversy arises between the original parties. As is said in the case of *Moody v. Wright*, 13 Metc. 32, "a stipulation that future-acquired property shall be holden as security for some present engagement is an executory agreement of such a character that the creditor with whom it is made may, under it, take the property into his possession when it comes into existence and is the subject of transfer by his debtor, and hold it for his security; and whenever he does so take it into his possession, before alienation thereof, such creditor, under his executory agreement, may hold the same." So in the case of *McCaffrey v. Woodin*, 65 N. Y. 459; s. c., 22 Am. Rep. 644, it was held that a provision in a lease which amounted to a chattel mortgage on after-acquired property while it conveyed no present legal title, inasmuch as the property mentioned was not then in existence, was yet a valid license to enter and seize the property as soon as it was acquired or came into existence; and after such entry and seizure the title vested in the mortgage even at law, and that in equity the lien would attach and bind the property as soon as it was acquired or came into existence, even before it was taken possession of by the mortgagee.

This doctrine was fully recognized in the case of *Williams v. Briggs*, 11 R. I. 476; s. c., 23 Am. Rep. 518, although the controversy there was not between the original parties, but between the mortgagee and an assignee of the mortgagor. It is true that in this case the decision was in favor of the assignee of the mortgagor, but it was placed upon the ground that the action was brought at

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law and not in equity, and that the mortgagee had never taken possession of the property mortgaged. The mortgage was upon the tools, fixtures, stock in trade for the manufacture of carriages, and all carriages made or in process of manufacture then in the carriage factory of the mortgagor, and also upon all stock, tools, fixtures and carriages, whether manufactured or in process of manufacture, "*that may be hereafter purchased by me, to be used in or about my business of buying and selling, making and repairing carriages.*" It appeared at the trial that only a small part of the property in controversy was in the possession or ownership of the mortgagor at the time of the making of the mortgage, the larger part of it having been subsequently acquired. DUFFEE, C. J., in delivering the opinion of the court, says (the italics being ours): "The case, therefore, raises the question whether a mortgage of property to be subsequently acquired conveys to the mortgagee a title to such property when acquired which is valid at law as against the mortgagor or his voluntary assignee. * * * We think such a mortgage is ineffectual to transfer the *legal* title of the property subsequently acquired, *unless* when acquired possession thereof is given to the mortgagee or taken by him under the mortgage." This case is cited as presenting, together with that of *McCaffrey v. Woodin*, *supra*, a very full collection of the authorities establishing the propositions herein announced. See, also, *Frazer & Co. v. Hilliard*, 2 Strobb. 309, where it is said, "If one sells goods in which he has no property at the time of the sale, and subsequently acquires a title, the property, as soon as a title is acquired by the seller, will vest in the buyer."

We think, too, that the plaintiff is estopped from maintaining this action. In consideration of indulgence on a debt then due, the plaintiff, by the paper in question, executes to the defendant, Byrum, an agreement intended as a mortgage, by which he stipulates, if the debt is not paid at the expiration of the period of indulgence, that Byrum shall be authorized to take the crops to be raised by him into his possession; and although, as against third persons, such agreement might not be held to be a valid mortgage, for the reasons above indicated, and possibly might not be sufficient to authorize the bringing of an action by Byrum against Moore to cover possession of the property mentioned, after default in payment of the debt (about which, however, we express no opinion) yet certainly, when, upon default in payment of the debt, the pro-

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erty has been taken possession of by Byrum or by his agent, the plaintiff cannot be allowed to recover it back; for to do so he must repudiate his own agreement under which he obtained the desired indulgence. Having got what he wanted—indulgence—in consideration that Byrum should have authority to seize the property in question upon default in the payment of the debt, he is estopped from now denying such authority. The fact that the property was taken possession of under the warrant issued by the clerk to enforce the supposed statutory lien, and not under the mortgage, *eo nomine*, cannot, in our opinion, make any difference. If Byrum had authority, as we have seen that he had, to take the property into his possession, it matters not how he acquired the possession so that he did not violate the criminal law.—*Wolfe v. O'Ferrell*, 1 Con. Tr. Rep. 155. Where the sheriff levies upon and sells property under an execution which confers no authority, yet if at the time he has in his office an execution which does give such authority, his action will be referred to that which confers the authority. So here, while the warrant issued by the clerk may not have been sufficient to authorize the seizure, yet the paper upon which it was issued and to which it was attached, regarded as a mortgage, was sufficient to authorize the seizure of the property, and under it the taking could be justified.

The judgment of the Circuit Court is set aside and a new trial ordered.

WILLARD, C. J., and HASKELL, A. J., concurred.

NOTE BY THE REPORTER. — The case of *Wyatt v. Watkins*, Tennessee Supreme Court, April, 1877; 16 Alb. L. J. 205, cited by counsel on both sides in the principal case, decides that a mortgage by the owner of land upon a crop yet to be planted is valid against an execution creditor. The opinion is as follows:

SHEED, J. The agreed case shows that the plaintiff agreed to furnish one Houston McCain with supplies, on condition that McCain, who was a farmer, should execute to the plaintiff a mortgage of his cotton crop, for the then current year (1875), as a security for the supplies so furnished. A deed of trust to that effect was accordingly executed in February, 1875, "upon a crop of cotton to be planted and grown upon the land of the said McCain in the year 1875, to secure said Wyatt for supplies furnished and to be furnished to said McCain, to enable him to make said crop." This deed of trust was duly registered. When the crop matured and became subject to levy, the defendant, Watkins, having recovered a judgment against McCain for the sum of \$42.95 before the execution of the deed, caused an execution to be levied on enough of the cotton to discharge his debt; and this action was brought to determine who has the better right. The question presented is, whether a crop of cotton yet to be planted is the subject of a valid mortgage; and the adjudged cases seem to be very much in conflict on the subject. A humane policy would seem to favor the affirmative of the proposition, as, if such is the law, the indigent farmer may obtain credit upon his prospects, and be enabled to subsist his family pending the cultivation of his crop. The case of *Grantham v. Hawley*, reported by Sir Henry Hobart

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in the reign of James I., is one of the earliest upon the subject, and has been frequently cited in support of the doctrine that a thing not *in esse* may be the subject of a valid chattel mortgage. That case, as cited, was as follows: A man seized of land let the same by indenture for twenty-one years, and covenanted that it should be lawful for the lessee, his executors and assigns, to carry away to his own use *such corn as should be growing* upon the ground at the end of the term; and afterward the lessor released his reversion; and one question was, whether the lessee was entitled to corn so growing, and it was argued, on the part of the assignee of the reversion, that it was merely contingent whether there should be corn growing upon the ground at the end of the term or not, and that the lessor never had property in the corn, and therefore could not give nor grant it, for the right to the corn standing at the end of the term, being certain, accrued with the land to the lessor. But judgment was given against the reversion, because it was said that the property, and very right of the corn when it came into being, was passed away, for this was both a covenant and a grant: and therefore, if it had been of natural fruits, as of grass or hay, which run merely with the land, the like grant would have carried them in property after the term. Then, though corn were *fructus industrialis*, so that he that sowed it might seem to have a kind of property *ipso facto* in it, divided from the land, and therefore it would go to the executor, and not to the heir; yet in this case, all the color the reversioner had to it was by the land which he claimed from the lessor who gave the corn; and though the lessor had not the corn actually in him, nor certain, yet he had it potentially, for the land was the mother and root of the fruits. Therefore, he that had that, might grant all fruits that might arise upon it afterward, and the property would pass as soon as the fruits were extant." Hob. 182; 1 Pow. Cont. 157, 158, 2 Walp. ed.

When stripped of all quaintness of verbiage, the plain doctrine of this old case is, that he who owns the soil may sell or assign the crops to be grown upon it. It is said in Benjamin on Sales, that in relation to things not yet in existence, or not yet belonging to the vendor, the law considers them as divided into two classes, one of which may be sold, while the other can only be the subject of an agreement to sell — of an executory contract. Things not yet existing which may be sold are those which are said to have a potential existence, that is, things which are the natural product, or expected increase, of something already belonging to the vendor. A man may sell the crop of hay to be grown on his field, the wool to be clipped from his sheep at a future time, the milk his cow will yield in the coming month, and the sale is valid. But he can only make a valid agreement to sell — not an actual sale — where the subject of the contract is to be something to be afterward acquired, as the wool of any sheep or the milk of any cows that he may buy within the year, or any goods to which he may obtain title within the next six months. Benj. on Sales, § 78. The precise point now in judgment, however, has been adjudged against the proposition that a thing not *in esse* is the subject of a valid sale or mortgage. Thus, it was held in *Hutchinson v. Ford*, 9 Bush, 318, where this exact question was involved, that "a mortgage of a crop to be raised on a farm during a certain term, but which is not yet sown, passes no title, and the mortgagee has no claim against the purchaser of the crop for it, or its value." *Everman v. Robb*, 3 Cent. L. J. 785; *Lunn v. Thornton*, 1 Man., Gran. & Scott, 379; *Barnard v. Eaton*, 2 Cush. 295; *Bank of Lanseingburgh v. Crary*, 1 Barb. 542; *Comstock v. Scales*, 7 Wis. 159; *Redd & Co. v. Burris & Williams*, MSS., Ga. 1877.

Many other authorities might be cited to the same effect, and quite as many that took in the other direction. *Andrew v. Newcomb*, 33 N. Y. 417; 8 Law Reg. 19-33; 17 Conn. 144; *Holroyd v. Marshall*, 10 H. L. Cas. 191; 18 Pick. 168; 14 Id. 497; 10 Metc. 481; 12 Cush. 376; *Brett v. Carter*, Cent. L. J., May 5, 1878; 32 N. H. 481; 18 Ver. 483; 1 McCaslin's Ch. 408; 24 Wis. 551; 26 Ill. 121; 43 Ala. 109; *Butt v. Ellett*, 19 Wall. 544; 42 N. Y. 620.

In one of these cases it is said: "In the case of crops to be sown, it vests potentially from the time of the executory bargain, and actually as soon as the subject arises." *Andrews v. Newcomb*, 33 N. Y. 417. Mr. Story says, that rights in remainder and reversion, possibilities coupled with an interest, rents, franchises and choses in action, are capable of being mortgaged. Eq. Jurisp., § 1021. A court of equity, he says, will support assignments, not only of choses in action, and of contingent interests and expectancies, but also of things which have no present, actual or potential existence, but rest in mere possibility: not, indeed, as a present positive transfer operative in *presenti* (for that can only be of a thing *in esse*), but as a present contract, to take effect and attach as soon as the thing

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comes in case. *Id.*, § 1040. Among the examples he cites is that of the assignment of the head-matter and whale-oil to be caught in a whaling voyage now in progress. The right will attach to the head-matter and whale-oil when attained. *Id.* So strongly are courts of equity inclined to uphold assignments when *bona fide* made, that even the assignments of freight, to be earned in the future, is good in equity, and will be enforced against the party from whom it becomes due. *Id.*, § 1055. In Story on Sales it is said: "While a person cannot make a present sale of all the wool there may grow on a sheep, which he may hereafter buy, nor any other thing in which his interest is wholly prospective and doubtful, there may be made a valid sale of the wine a vineyard is expected to produce, or the grain a field is expected to grow, the milk of a cow for the next year, or the future young of animals." Story on Sales, § 188; *McCarty v. Bliven*, 5 Reg. 196. Whatever is the subject of a valid sale is, of course, the subject of a valid mortgage. A man may sell or mortgage every thing that is his property; and such a sale, if *bona fide*, will be upheld in law and equity. Property is the right and interest a man has in lands and chattels to the exclusion of others. 17 Johns. 283; 11 East, 290; 4 Pet. 511. All property, real or personal, corporeal or incorporeal, movable or immovable, may be the subject of mortgage. 1 Hill on Mort. 6. Things are said to have a potential existence when they are the natural product or expected increase of something already belonging to the vendor. *Low v. Peur*, 11 Am. Rep. 357. The term "incorporeal property" includes all legal rights. The right in the proprietor of the soil to plant, cultivate and gather his crops, to the exclusion of all others, is an absolute legal right, and an incorporeal property; and incorporeal property is as well the subject of valid sale and mortgage as any other kind of property. The mortgagor, in this case, was the proprietor of the land on which he proposed to raise the crop in controversy. The crop had a potential existence because it was to be the natural product and expected increase of the land then owned and occupied by him. Why may he not obtain the credit necessary to make the crop by executing a mortgage upon it? We see no sound reason why. Who is to be injured by it if the transaction is *bona fide*, and there be no superior lien for rent or otherwise? Who is to be misled by it if the transaction is at once published to the world by registration, as was done here? If the merchant is willing to furnish him with supplies, and enable him to make the crop, and take the risk of the crop itself for security, who has a right to complain, and where is the *mala fides* of the transaction? Is there any doubt that a court of equity would sustain the mortgage and protect the mortgagee in such a transaction? Then wherefore must he fail in a court of law, into which forum the parties have brought the case, and where our liberal statute requires that in such a case their rights shall be adjusted upon equitable principles. In the case of *Andrews v. Newcomb*, above cited, it is said, that as long as the time of Chief Judge HOBART, it was held that one proposing to plant crops might convey them in advance, and that the fruits which should arise afterward would pass as soon as they were extant; citing Hob. 132; 3 Johns. 216, and *Hare v. Caley*, Cro. Eliz. 143. Crops to be raised, say the court, are an exception to the general rule, that title to property not in existence cannot be affected so as to vest the title when it comes into being. In the case of crops to be sown, it vests potentially from the time of the executory bargain and actually as soon as the subject arises. 33 N. Y. 421. The judgment in this case certainly created no lien upon the crop, which the statute protected from levy until after maturity. The judgment debtor had failed with his title, and the judgment creditor could stand on no higher ground than his debtor. We hold the assignment to be lawful and valid, and that the plaintiff below has the better right to the fund in controversy.

Affirm the judgment.

Judgment affirmed.

In *Booker v. Jones' Administratrix*, 53 Ala. 266, it is said: "The operation and effect of mortgages of personal property not in existence, or not owned by the mortgagor at the execution of the mortgage, the future acquisition of which was contemplated by the parties, is the subject of much discussion, and of great diversity of judicial decision. It is universally admitted, and is a mere truism, that a sale, grant or mortgage of property, real or personal, *in present*, to which the vendor, grantor or mortgagor has no title, or which has no existence, is inoperative and void in a court of law or equity. If the thing exists as between the parties, possession being transferred, operation or effect may be given the sale or conveyance; but as against the party in whom the title resides, it is without force. If the thing has no existence, there is no

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subject of sale, grant or mortgage. Things not *actually existing*, but having a *potential existence*, as it is usually expressed — 'things which are the natural product or increase of something already existing, and the property of the vendor' — may be the subject of a sale, grant or mortgage. A growing crop, however immature its state, and whatever of labor may be required for its cultivation to maturity, and its severance from the soil, is a personal chattel, subject at common law to execution against the tenant, passing to his personal representative, not descending with the land to the heir, and is the subject of sale or mortgage, *Adams v. Tanner*, 5 Ala. 740; *Evans v. Lamar*, 21 id. 333; *McKenzie & Son v. Lampley*, 31 id. 523; *Robinson & Caldwell v. Mouldin, Montague & Co.*, 11 id. 977.

"The mortgage was not of a growing crop; the mortgagors had not entered on the leased premises, and had not a right to enter for more than two months after the execution of the mortgage; and the cotton would not be planted for more than two months after the right of entry accrued. The mortgage was, therefore, intended to operate on cotton not planted, but which it was contemplated the mortgagors would, in proper season, after entry on the leased premises, plant and cultivate to maturity, and which during the term they should annually plant and cultivate. If no other relation existed between the parties than that of mortgagor and mortgagee, we incline to the opinion that if at law the mortgage would be invalid as a conveyance of things not in existence, unless ratified by some act done by the mortgagor after their acquisition, in equity it would attach to the crop, as it came into existence, transferring the beneficial interest against the mortgagor and all others than a *bona fide* purchaser without notice. 1 Chit. on Cont. 523-30; on Benj. on Sales, §§ 78, 84; *Butt v. Ellet*, 19 Wall. 544; *Sillers v. Lester*, 48 Miss. 513; *Stewart & Irvine v. Fry*, 3 Ala. 573; *Kirksey v. Means*, 43 id. 426; *Abraham v. Carter*, June term, 1875, in manuscript."

In *Sellers v. Lester*, 48 Miss. 513, to secure the payment of one year's rent of a plantation, the tenant executed to the landlord a mortgage upon all the mules, etc., then on the rented premises, upon all crops to be grown thereon, and upon all the mules, etc., to be put thereon during the year. Held, that the mortgage attached to the subsequent acquisitions referred to as soon as they were acquired, and was good against a subsequent mortgage made on the same property after it was acquired, especially as the subsequent mortgage was to secure an antecedent debt, and the subsequent mortgagee had notice of the prior mortgage. The court say: "At law it is uniformly and rightfully held, that a chattel mortgage cannot operate on property not in actual existence at the time of its execution. *Seymour v. Canandaigua, etc., R. R. Co.*, 25 Barb. 234. Courts of equity, however, 'enforce the specific execution of contracts and give relief in numerous cases of agreements relating to lands and things in action, and contingent interests or expectancies, upon the maxim that equity considers that done, which, being distinctly agreed to be done, ought to have been done.' Id. 302; *Grounds and Rudiments of Law and Eq.* 75.

"Judge STORY, in *Mitchell v. Winslow*, 2 Story, 644, states this very distinct result of his own examination of the question: 'It seems to me a clear result of all the authorities, that whenever the parties, by their contract, intend to create a positive lien or charge, either upon real or personal property, whether then owned by the assignor or contractor or not, or if personal property, whether it is then in being or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto against the latter, and all persons asserting a claim thereto under him, either voluntarily or with notice, or in bankruptcy.' In that case the question was between the assignee in bankruptcy and the mortgagee of after-acquired personal property of the mortgagor.

"Referring to this subject, the court, in 25 Barb. 305, say: 'As soon as the property is acquired, or comes into existence, the lien in or upon it attaches. They come into being together and co-exist. Equity executes the contract by holding that what is agreed to be done is done; that the right to the lien creates the lien.' 1 Ves. 409, 412.

"It is laid down as a rule in 2 Story's Eq. Jur., § 1040, that 'courts of equity will support assignments not only of choses in action and of contingent interests and expectancies, but also of things which have no present actual or potential existence, but rest in mere possibility; not indeed as a present positive transfer, operative in present, for

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that can only be of a thing *in esse*, but as a present contract, to take effect and attach as soon as the thing comes *in esse*.' Story cites, in support of this rule, 2 Story, 630, and 11 Conn. 154; and in illustration of the doctrine, *Langton v. Horton*, 1 Hare, wherein it was held that 'an assignment of a whale ship by way of mortgage, and of all oil, head-matter and other cargo caught or brought home on a whaling voyage, will amount to a good assignment of the future cargo of oil and head-matter obtained in the voyage,' and 'will be valid in equity, and will attach to the head-matter and oil when obtained.' In this last case named, the contest was between the mortgagee and a judgment creditor of the mortgagor, and the creditor was enjoined; the mortgagee, upon the return of the vessel, having taken steps to reduce the property mortgaged to possession.

"The vice-chancellor, in delivering his opinion in *Langton v. Horton*, 1 Hare, 549, says: The substantial question in this case is, whether the future cargo of the Foxhound * * * passed, either at law or in equity, by the assignment from Birnie to the plaintiffs. I lay out of view all question as to the operation of the instrument at law, and look at the case only as a question in equity.' And he continues: 'Is it true, then, that a subject to be acquired after the date of the contract cannot, in equity, be claimed by a purchaser for value under that contract?' He answers: 'It is impossible to doubt, for some purposes at least, that by contract, an interest in a thing not in existence at the time of the contract may in equity become the property of a purchaser for value.' And he proceeds to enumerate several instances and adjudications, in illustration of which the one he was considering was very strongly in point in the case at bar. Among other rules of a court of equity, he states this: 'And when this court has once established that the equitable ownership may be in one person and the legal ownership in another, the court must interpose where it is necessary to protect the equitable ownership, and for that purpose I am not aware that the court ever refuses its interposition.'

"*Field v. Mayor, etc., of New York*, 2 Seld. 179, was an assignment for valuable consideration of demands against the corporation of New York city for printing, having at the time no actual existence, but vested in expectancy merely. Held, to be valid in equity as an agreement, and take effect as an assignment when the demands were subsequently brought into existence. And 2 Story's Eq. Jur., §§ 1040, 1040 b, 1055; 2 Story, 630; 1 Hare, 549; Story on Bailments, § 294, are cited in support of the adjudication. The court say: 'There was indeed no present actual potential existence of the thing to which the assignment or grant related, and therefore it could not and did not operate *eo instanti* to pass the claim which was expected thereafter to accrue to Bell against the corporation; but it did, nevertheless, create an equity, which would seize upon those claims as they should arise, and would continue so to operate until the object of the agreement was accomplished. On this principle an assignment of freight to be carried in future will be upheld and enforced against the party from whom it becomes due. * * * Whatever doubts may have existed heretofore on this subject, the better opinion, I think, now is, that courts of equity will support assignments, not only of choses in action but of contingent interests and expectations, and of things which have no present actual existence, but rest in possibility, provided the agreements are fully entered into and it would not be against public policy to uphold them.'

"Although there cannot be a pledge, technically speaking, of a chattel not in existence, there may be a hypothecation, so that as soon as the chattel shall be produced the lien will attach. This was held in 14 Pick. 497, where it was stipulated by a brick-maker that the lessees of a brick-yard should retain the bricks to be made as security for the advances to the brickmaker."

"Hilliard on Mort., vol. 2, p. 379, § 4, contains this commentary on the subject under consideration: 'With reference to the mortgage of future property, it is laid down as the general rule in England that an assignment will not at law pass chattels not in existence, or in the ownership of the grantor, or not sufficiently appropriated at the time of the assignment, although such an assignment may have effect by a subsequent act of the grantor in furtherance of the original disposition. And accordingly a bill of sale of the furniture and effects in a certain house will only pass such things as are in the house at the time of the grant, though effects to be subsequently brought on the

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premises are expressly included. But the instrument might, it seems, be so framed as to give the mortgagee a power of seizing such future chattels of the grantor as they should be acquired by him and brought upon the premises; and such future chattels will pass where there is already a foundation of an interest in the grantor.'

"And this author adds, what is quite true, that 'the doctrine upon this subject in the United States has been somewhat various.' In *Carr v. Allat*, 27 L. J. Exch. 385, cited in a note by Mr. Hilliard, it is said: 'When, on the face of an assignment of personalty, it is plain that it was intended to operate as a continuing security, and to apply to property afterward acquired and substituted for that which was originally assigned, it will, if the words are capable of such a construction, be so applied; and where, in such a case, the deed was found capable of such a construction, although rather in the indirect power of attorney; that in the way of direct conveyance it was construed to extend to stock and growing crops on a farm not occupied by the assignor at the time of the execution of the deed.'

"The doctrine declared by Judge STORY was a well-recognized principle of the civil law, and thus stated: 'Those who bind themselves by any agreement whatsoever may, for the security of their performance of the engagement on their part, appropriate and mortgage not only the estate they are masters of at the time of contracting, but likewise all the estate which they shall be afterward seized or possessed of. And this mortgage extends to all things which they shall afterward acquire that are capable of being mortgaged, by what title soever it be that they acquire them, and even to those which are not in being when the obligation is contracted, so that the fruits which shall grow upon the lands will be comprehended in the mortgage of an estate to come.' Domat (Cush. ed.), 649, art. 5.

"The object of equity is to do that exact justice between litigants which the truth and right demand, regardless of technicalities; and though not prepared to adopt broadly the rule laid down by Judge STORY, yet we can see great propriety in the application of his views in a proper case, and when necessary to carry into effect the honest and just contracts of parties according to their real intentions. Indeed, it is the common practice of equity, both in England and in this country, to proceed untrammelled by the technical rules of the common law, and to do right between contestants as far as human imperfection will permit."

In *Redd v. Burrus*, 58 Ga. 574, it was held that there can be no valid sale or mortgage of a crop until it is planted. But in *Stephens v. Tucker*, 55 id. 543, it was held that a mortgage may embrace a crop of which the seed is planted and which is growing.

For *Williams v. Briggs*, cited in the opinion, see note, 23 Am. Rep. 653. See, also, *Onk v. Corthell*, 11 R. 1. 482; s. o., 23 Am. Rep. 518; *Arques v. Wasson*, 51 Cal. 620; s. o., 21 Am. Rep. 718; *Apperson v. Moore*, 30 Ark. 56; s. o., 21 Am. Rep. 170. *Contra: Hutchinson v. Ford*, 9 Bush, 318; s. o., 15 Am. Rep. 711.

CASES

IN THE

SUPREME COURT

OF

TENNESSEE.

ADKINSON V. THE STATE.

(5 Baxt. 509.)

Criminal law — burglary — breaking out.

One who secretes himself in a dwelling-house at night, with intent to commit a felony therein, and being discovered, escapes by unlocking or opening a door, is not guilty of burglary.*

CONVICTION of burglary. The opinion states the facts.

Attorney-General Heiskell, for the State.

No counsel named for defendant.

FREEMAN, J. This is an indictment, charging that defendant unlawfully, feloniously and burglariously did break and enter the mansion house of Margaret Mallon, in the night time, with the unlawful and felonious intent, then and therein, her, the said Margaret Mallon, unlawfully, forcibly, feloniously, and against her will, to ravish and have carnal knowledge of, against the peace and

*To same effect, *Brown v. State* (55 Ala. 123), 28 Am. Rep. 603.

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dignity of the State, etc. The jury found defendant guilty as charged, and affixed punishment in the penitentiary for twelve years and six months. The facts shown are substantially as follows:

Mrs. Mallon, a widow lady, kept a grocery store in Nashville in the front part of her house; her bedroom and kitchen were in the rear part of the building. On the day of the alleged offense, the back doors of the house were open, as well as the windows, and remaining so until about ten o'clock at night. About this time she closed the front doors, went into the back part of the house, let down the windows, shut the doors and locked them on the inside, leaving the keys in the locks. She then went to her bed and moved it from the wall in order to adjust the mosquito-bar, when she felt the bed strike against something under it, which she then supposed to be a dog. She went into the front room, got a candle and returned. On looking under the bed she saw the defendant lying on his side with a large pocket knife open in his hand. She ran to the front door crying robbers, asking for help, and giving a general alarm. Parties near by ran into the house, when defendant went out at the back door, unlocking it, and fled. He was pursued and soon after captured. She had known defendant some years. He had been in front of the house eating water-melons in the evening with some other negroes, and had been ordered away by her because of the dirt made by the party. He had been refused credit by her, as she says, some three years before, when he replied, "he would get even with her yet." The house of Mrs. Mallon was situated in a thickly settled part of the city—other houses close to it.

It is clear from the testimony that defendant went into the house at an open door, and secreted himself under the bed, with the purpose, we have no doubt, of committing some felony, but what that was to be we have no means of determining, except such as are furnished by the above facts.

Burglary is defined by the Code, section 4672, to breaking and entering into a mansion house by night with intent to commit a felony. This is substantially the common-law definition. By section 4674 it is provided that if any person who, after having entered any of the premises mentioned in the first section of the article with intent to commit a felony, break any such premises, he shall be punished in the same way as if he had broken into the premises in the first instance. This last section can only refer to a case where the party has entered without breaking actually or technically, and then, in

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furtherance of his felonious design, does break after entrance; as when a party enters a house without breaking, and then, in pursuance of his felonious design, breaks open a wardrobe, show-case, or an inner door, in order to effectuate his purpose. We do not think it can apply to the case of a party who, to enable himself to escape by flight from the house, opens a door as in this case.

The question then recurs, was there such a breaking in this case as makes the offense of burglary? According to Blackstone, as well as other authorities, there must be a breaking as well as an entry in order to make the offense. This may either be by force, or by opening a door, raising the latch for the purpose, picking a lock or opening it with a key, or unloosing any fastening which the owner has provided, or even coming down a chimney, it being as is said, as much closed as the nature of things will permit. Such breach may also be made by fraud, as by knocking at the door and procuring it to be opened, and then rushing in with felonious intent. The same author, however, lays it down as law, "but if a person leaves his doors or windows open, it is his own folly and negligence, and if a man enters therein it is no burglary; yet if he afterward unlock an inner chamber door it is so. See Cooley's Black., book 4, 226-7.

This authority, with authorities cited in notes to the above, seems to be conclusive. We have seen nothing contrary to this, and think the principles cited are sound law. It is insisted, however, by the attorney-general that unlocking the door for flight makes the breaking required in this offense, under section 4674 of the Code, which is: "Any person who, after having entered any of the premises mentioned in the first section of this article with intent to commit a felony, break such premises, he shall be punished in the same way as if he had broken into the premises in the first instance." This, however, is nothing more than the principle of the common law, that breaking in furtherance of the design, that is felonious purpose, after entry, makes out the offense. It cannot mean that breaking after abandonment of the purpose, and for a different purpose than the commission of a felony, shall be referred arbitrarily to the felonious design. If this should be held, a party who, by trespass, enters a house with design to steal, who changes his mind and abandons that purpose, but in going out of the house unlocks a door for egress, would be guilty of burglary. We cannot assent to this view of the question. The door, in this case, was

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unlocked for escape from the house, not for entrance or in forwarding a felonious design. There was no felonious breaking in this view. We have been referred to Tibbs' Cr. Cases, *Rex v. McKearney*, as sustaining his views. That case, however, was where the indictment had a count for breaking out of the house, which was expressly made burglary by statute. 12 Anne, ch. 1, § 7. See Wheat. Cr. Law, 1874, sub-§§ 1536, 1546.

Judgment will be reversed and the cause remanded.

STOKES V. STATE.

(3 Baxt. 619.)

Criminal law — evidence — calling on prisoner to "make tracks" in court.

On an accusation of murder, it being claimed that certain foot-prints were those of the prisoner, the prosecuting attorney brought a pan of mud into court and placed it in front of the jury, and having proved that the mud in the pan was about as soft as that where the tracks were found, called on the prisoner to put his foot in the mud in the pan. On objection, the court instructed the prisoner that it was optional with him whether he would comply. The prisoner refused, and the court instructed the jury that his refusal was not to be taken against him. The prisoner being convicted, *held*, that he was entitled to a new trial.*

CONVICTION of murder. The opinion states the facts.

Attorney-General Heiskell, for the State.

P. G. Stiver Perkins, O. S. Galbreath, W. D. Covington, for Stokes.

LEA, Sp. J. The prisoner was indicted for the murder of Mrs. Housen in the Criminal Court of Davidson. He was tried, convicted of murder in the second degree, and sentenced to twenty years in the penitentiary.

Mrs. Housen was taken from her house at night and carried some distance and hung to what the witnesses term a "hog pole." Near the place where she was hung a track was found in the mud, in a

*See *State v. Graham* (74 N. C. 646), 21 Am. Rep. 493; *State v. Sanders*, post.

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branch, made by a bare foot. The inference from all the surrounding circumstances is, that the person who made that track was one of the parties who were engaged in the murder. And, upon an examination of the record, we are satisfied that the jury in part based their conviction upon their belief that the track found in the mud in the branch near where Mrs. Housen was hung was made by the foot of the prisoner. The question then is, whether the track was made by the prisoner was of very great importance in the investigation.

Upon the trial of this cause, the bill of exceptions shows that "the State brought in a pan of mud and placed it immediately in front of the jury, and then asked the witness if the mud in the pan was about as soft as the mud in the branch where he saw the track. Witness said it was. To all of which defendant objected and the same was overruled. The attorney-general then called upon the defendant to put his foot in the mud." Upon objection, the court told the defendant he could put his foot in the mud if he wanted to, but he would not force him to do so.

Subsequently another witness was asked "if he saw the pan of mud setting there before the jury. He said he did, and he was asked if he saw any track in it. He said he saw none. To all which defendant objected. Here the attorney-general again called upon the defendant to put his foot in the mud."

Because of this action of the attorney-general, and the assent of court thereto, this cause is reversed and remanded. In the presence of the jury the prisoner is asked to make evidence against himself. The court should not have permitted the pan of mud to have been brought before the jury, and the defendant asked to put his foot in it. We are satisfied the jury was improperly influenced thereby. And it is no sufficient answer that the judge afterward told the jury that the refusal to put his foot in the mud was not to be taken as evidence against him. The bringing in of the pan of mud and the request of the attorney-general was improper and should not have been permitted by the court. We greatly deprecate the practice into which some Circuit judges have fallen, in permitting incompetent and illegal testimony to be placed before the jury, and afterward, at the close of the case, withdrawing it and telling the jury not to be influenced thereby. Such testimony should be promptly rejected, and not permitted to go to the jury at all, for jurors with minds untrained to legal investigations and discrimi-

nations are sometimes likely to be influenced thereby, although such incompetent evidence may be afterwards withdrawn. And while we will not reverse because of the admission of incompetent evidence afterward withdrawn, unless we are satisfied the jury was in fact influenced thereby, yet the correct practice is to reject such evidence at once, and not permit it to go to the jury.

In this case, as before stated, we are satisfied that the action of the attorney-general in bringing the pan of mud into court and requesting the defendant to put his foot in it had an influence upon the jury prejudicial to the prisoner. Although we might be satisfied of the prisoner's guilt, yet it is our duty to see that he has a fair and impartial trial, and this he must have though costs may accumulate and punishment be long delayed.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

MOORE V. MAYOR AND COMMISSIONERS OF FAYETTEVILLE.

(80 N. C. 154.)

Constitutional law — Tax on National bank stock.

A statute empowering the authorities of a town to impose the same taxes, for municipal purposes, upon non-residents pursuing their ordinary avocations within the corporate limits as upon the inhabitants, with a *proviso* that non-residents so taxed shall have the right to vote at municipal elections, is not abrogated by a change in the State Constitution which deprives the non-resident tax-payer of his vote, and authorizes a tax upon the shares in a National bank, located in the town, and held by one who conducts his ordinary business therein, but whose residence is in the county, outside the corporate limits.

MOTION for injunction to restrain the collection of a tax. The plaintiff resides near to and outside the corporate limits of Fayetteville, but conducted and carried on business as a merchant within the town. He was president of the People's National Bank, also located in the town and owned stock therein, on which the corporate authorities levied and attempted to collect an *ad valorem* tax, such as is assessed upon similar property possessed by resident owners. The court below denied the motion, and the plaintiff appealed.

Moore v. Mayor and Commissioners of Fayetteville.

B. Fuller, for plaintiff.

N. W. Ray, for defendants.

SMITH, C. J. By an act of the general assembly amendatory of the act of incorporation, and ratified May 20th, 1864, § 4, it is declared that the mayor and commissioners of Fayetteville are hereby empowered to impose the same taxes, for municipal purposes, upon all persons whose *ordinary avocations are pursued within the corporate limits* of the town, although *resident beyond the corporate limits*, in like manner and to the same extent, as upon persons resident within the corporate limits; *provided*, that non-residents thus taxed shall have the right to vote at municipal elections.

In *Buie v. Commissioners of Fayetteville*, 79 N. C. 267, it is decided that shares of stock in National banks, held by persons residing in the State, are subject to taxation in the county of the owner's residence, as part of his personal estate, and not elsewhere for State and county purposes. The present case presents the question whether such stock, owned by one whose residence is just outside but whose business is within the corporate limits, may be taxed for municipal purposes in like manner as if his residence was also in the town. As the place and manner as well as extent of taxation of its citizens are regulated by the laws of the State, the solution of the question must be found in the proper interpretation to be put upon the clause of the amended charter, and in our opinion, is free from all reasonable doubt. The words are direct and positive, that such property as is held by the plaintiff shall be subject to the burden of municipal taxation. The intention and the effect of the act are to make such a person, for purposes of taxation, an actual resident of the town. We have said in the case referred to, that resident stockholders in National banks might be taxed where the legislature directed, and they are here subjected to municipal assessment in the town. In this respect the plaintiff is made to share in the burdens, as he does in the advantages of a town residence, and we see no reason why he should not.

It is contended, however, that the *proviso* conferring the right to vote and participate in the management of municipal affairs has been superseded and annulled by the Constitution of 1868, and that this political privilege is so associated with the liability that the repeal of the one is the extinguishment of the other. We do not

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so construe the section. The electoral right is conferred on such as may constitutionally exercise it, but is not an inseparable condition of taxation. Persons under age, and women in the situation of the plaintiff, may be assessed and yet they cannot vote. If further restrictions are imposed by the organic law upon the electoral franchise, reducing it within narrower bounds or withdrawing it altogether, if such be the effect of the Constitution, from the class to which the plaintiff belongs, this does not annul the authority to impose the tax. There is no such necessary connection between the liability created in the body of the section and the privilege conferred in the attached proviso, that the former may not remain without the latter. If the constitution denies to the plaintiff the right to vote for officers of the town government for want of actual residence within its boundaries, he shares in other municipal privileges and is not exempt from the common burden by which these privileges are secured to himself and others.

It was suggested in the argument that the tax is levied as well to pay the corporate debt as to provide for the current expenses of the town government, and the first are not "for municipal purposes" within the meaning of the act. It is quite as much the duty of the authorities, in exercising the power of taxation, to provide for an existing legal obligation as for the expenses of governing the town and managing its affairs, and both are "for municipal purposes." The words are broad and comprehensive, looking to every legitimate use to which the moneys levied can be properly applied. The maxim invoked, in aid of the argument, that taxation and representation go together, has no application to individuals, but to political communities as such. Otherwise non-residents would escape all taxes whatever.

No error.

Affirmed.

RIGGAN V. GREEN.

(80 N. C. 238.)

Deed of lunatic — when valid.

A deed executed by a lunatic is voidable only, and not void; and equity will not interfere to set aside such deed, where the grantee cannot be put *in statu quo*, or where the benefit received by the grantor is actual, and of a durable

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character; therefore, in an action by heirs to recover land upon the ground of incapacity of their ancestor to make a deed, it appearing that the purchaser paid full value, without advantage taken, and without notice of such incapacity, that the deed was attested by a brother and two sons of the grantor, and that the purchase-money was used for the benefit of himself and family; and that the purchaser made large improvements, without objection; *held*, that they were not entitled to recover.*

ACTION by the heirs of Joseph H. Riggan, to recover land. Defendants claimed the same land mediately under a deed of plaintiffs' ancestor. The plaintiffs' reply to the defense set up that the deed of Riggan to Brown was executed when the grantor was of unsound mind and not of capacity to execute a deed. To this the defendants rejoined, that they and their grantors purchased for full value and without notice of any incapacity to make the sale, and that the purchase-money paid went to the benefit of the grantor and his family. The defendants had judgment below.

Batchelor & Edwards, for plaintiffs.

J. J. Davis and Gilliam & Gatling, for defendants.

DILLARD, J. Under our present system the distinctive principles formerly applicable in the separate courts of law and equity are now to be recognized in the superior courts, and such a judgment and decree is to be pronounced, as the equitable rights of the parties may require. And in conformity to this idea, the order of reference in this case was drawn, giving the referee power to deal with the matters under investigation, as a chancellor under a bill to set aside the deed of a lunatic. Considered in this point of view, it becomes material to inquire what is the effect of the deed of a lunatic for land, and for what and under what circumstances will such a deed be set aside, and a recovery allowed of the property conveyed.

The doctrine as to the effect of the deed of a lunatic is thus laid down by Blackstone, vol. 2, p. 295: "Idiots and persons of non-sane memory, infants and persons under duress, are not totally disabled to convey or purchase, but *sub modo* only; for their conveyances and purchases are voidable and not actually void." In 2 Kent's Commentaries, 451, it is said, "that sanity is to be presumed until the contrary be proved, and therefore by the common law a

* To same effect, *Eaton v. Eaton* (87 N. J. 108); 18 Am. Rep. 718.

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deed made by a person *non compos mentis* is voidable only, and not void." By our statute law, a deed executed and *registered* passes a seizin, and by the decisions under said statute the registration of a deed of bargain and sale is equivalent to livery of seizin in a feoffment (Bat. Rev., ch. 35, § 1; *Hogan v. Strayhorn*, 65 N. C. 279; *Hare v. Jernigan*, 76 id. 471); and therefore we conclude that the deed of Joseph H. Riggan availed to pass an estate to James T. Brown, and the same was valid until by action of the grantor or his heirs the same is avoided.

Such being the operation of the deed, and this action being brought in a court competent to recognize and administer the legal and equitable rights of the parties in the same suit, it remains to determine how the court ought to have dealt with the subject-matter involved therein.

Courts of equity ever watch with a jealous care every contract made with persons *non compos mentis*, and always interfere to set aside their contracts, however solemn, in all cases of fraud, or when the contract or act is not seen to be just in itself, or for the benefit of such persons; but when a purchase is made in good faith, without knowledge of the incapacity, and no advantage is taken, for a full consideration, and that consideration goes manifestly to the benefit of the lunatic, courts of equity will not interfere therewith. 1 Story's Eq., §§ 227, 228; 1 Chitty on Contracts, 191; *Molton v. Camroux*, 2 Exch. 487. If a court of equity in any case sets aside the deed of a *non compos*, it will ordinarily administer the equity of having him to pay back to the other party the money or other thing received of him. And when it appears that the consideration is full and the lunatic is not able to put the other party *in statu quo*, or, if the benefit received is actual and of a durable character, in either case, the courts of equity will not be inclined to set aside the conveyance. *Carr v. Holliday*, 1 Dev. & Bat. Eq. 344, and same case, 5 Ired. Eq. 167.

Now in the light of these principles what ought to have been the conclusions of law by the referee on the facts found and set forth in his report, and what should have been the judgment in the court below on the exceptions taken to referee's conclusions of law? It is expressly found as a fact that the \$500 paid by Brown to Riggan was the full value of the thirty acres conveyed to him, and that the same went to extinguish an execution against the lunatic in the hands of an officer, and that by means thereof the said Joseph H.

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Riggan was enabled to keep and occupy, till his death, another piece of land designated as his homestead, which now, by descent, belongs to plaintiffs; that the deed of Brown was executed in the family of the grantor, and attested by a brother and two sons of the grantor, and that Brown and the defendants claiming under him have ever since held and used the said land as their own, and made large improvements, without objection or any interposition by the grantor or any other on his behalf; and it is further found as a fact,* that the purchase of defendants was for full value, and without notice of any incapacity in Joseph H. Riggan. From such a state of facts, it would be apparent to the chancellor, and he would so decide, that a rescission of the deed would produce no benefit to the plaintiffs if coupled with the duty and obligation to replace defendants *in statu quo*, whilst it would be a great inconvenience and injustice to the defendants, and thereupon the conclusion would be not to interfere to set aside the deed, but leave the same to be operative and valid. And it is therefore our opinion that the referee was correct in his conclusions of law, and no error was committed by the judge in the court below in overruling the plaintiffs' exception.

No error.

Affirmed.

 MAUNEY V. COLT.

(80 N. C. 800.)

Negotiable instruments — duty of holder of, for antecedent debt — partnership — power of settling partner after dissolution to waive protest.

When a draft on a third person is given in settlement of an antecedent debt, it is the duty of the holder to present it, and to give notice of its dishonor if not paid, and a failure to do so will discharge the debt.

Where a settling partner, after dissolution, gives a draft in payment of a partnership debt, he cannot waive protest so as to bind his former dormant co-partner.

ACTION on account. The opinion states the facts. The plaintiff had judgment below.

J. M. Clement, for plaintiffs.

McCorkle and Bailey, for defendant.

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SMITH, C. J. The record sets out numerous exceptions taken by the appellants during the trial before the jury, to the adverse rulings of the court in the admission and rejection of evidence which need not be considered in disposing of the appeal.

The defendant is sued as a dormant and newly-discovered partner of Amos Howes, with whom the debt alleged to be due to the plaintiffs was contracted, and the verdict finds such partnership to have existed. The business conducted by Howes alone and in his own name terminated on the 1st day of June, 1874, and the Gold Hill mining property under a sale passed into the possession of a corporation known as the North Carolina Amalgamating Company, its successor, and Howes then proceeded to settle up his business.

On the 2d of June, Howes gave to the plaintiffs five several drafts on the said corporation, of which one was at thirty days for \$3,000; a second at thirty days, also, for \$2,000; a third at three months for \$3,500; a fourth at five months for \$3,000, and the last at six months for \$1,000, in the aggregate sum of \$12,500, and at the same time paid them \$500 in cash.

These drafts, the jury say in response to one of the issues submitted to them, closed the plaintiffs' account, and in amount were sufficient, as the plaintiffs admit, to pay the entire indebtedness due to them. The two earliest maturing drafts were paid and the others duly accepted by the company. At the maturity of the third draft, the first falling due of those unpaid, Howes gave to the holders a writing in the following words: "Salisbury, N. C., Sept. 3d, 1874. I, Amos Howes, do hereby waive protest of all the above stated drafts and agree to any extension of time the holders may assent to. (Signed) Amos Howes." Which writing was appended to a descriptive list of claims, among which the three unpaid drafts are mentioned.

This agreement of Howes was entered into more than three months after the dissolution of the alleged partnership association, and the entire discontinuance of its operations, and so far as the case discloses, without any new consideration therefor. It does not appear whether the drafts were taken by the plaintiffs in payment or as a collateral security for their debt, nor that any arrangement was made by the holders with the acceptors for extending the time of payment; nor that any measures were adopted to collect or secure the drafts, nor is any excuse or explanation offered of

the failure to do so. The drafts themselves were produced at the trial and tendered to the defendant.

Upon this evidence and defect of evidence various instructions were asked by the defendant's counsel, the first of which, embodying the substance of all, is in these words: "If the plaintiffs received from Amos Howes his drafts on the North Carolina Gold Amalgamating Co., accepted by said company, then no recovery can be had upon the account existing at that time, notwithstanding that Howes, the drawer, may have waived notice of protest." This and the other instructions were refused, and none of like import given in their stead. In this there is error.

The true rule which should have been laid down for the guidance of the jury may be thus stated:

If the drafts were given and received for and in closing up the account, and were afterward accepted by the company, it was the duty of the plaintiffs to present them at maturity for payment, and if not paid within a reasonable time, to take proper steps for their collection, and if they failed to do this, and the drafts became worthless, it would in law be a discharge of the original debt, and the defendant is not affected by the written agreement of Howes in reference thereto.

The principle contained in the proposed instruction rests upon sound reason and is sustained by ample authority.

In *Smith v. Wilson*, Andrews, 187, LEE, C. J., thus declares the law: "When a note is taken for a precedent debt, which is the present case, it must be intended to be taken by way of payment upon this condition, that the note is paid in a reasonable time, but if the person accepting it doth not endeavor to procure such payment, and the money is lost by his default, he must, and it is reasonable he should, bear the loss."

In *Chamberlyn v. Delarive*, 2 Wils. 353, the defendant, being indebted for work and labor done, gave the plaintiff a draft on one Heddy for the sum due, and the plaintiff held the draft for four months without applying to Heddy, and he became insolvent. It was held that there could be no recovery in an action brought on the original indebtedness, and the court say: "The plaintiff by accepting the note or draft undertook to be duly diligent in trying to get the money of Heddy and to apprise the defendant, the drawee, if Heddy failed in payment. The plaintiff substituted himself in

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place of the defendant, who has been deluded into a belief that the plaintiff had got the money of Heddy."

In a very similar case where the bill given "for and on account" of a precedent debt, EARLE, C. J., with the concurrence of all the judges, lays down the rule thus: "The legal effect of taking a bill as collateral security is, that if, when the bill arrives at maturity, the holder is *guilty of laches and omits duly to present it*, and to give notice of its dishonor if not paid, the *bill becomes money in his hands*, as between him and the person from whom he received it. That being so, the *plaintiff's debt is satisfied*. *Peacock v. Purcell*, 108 Eng. C. L. R. 728. "When a party contracts a debt," says a recent writer on this subject, "and contemporaneously gives in additional payment, his draft upon a third party, it is the duty of the creditor to present it in a reasonable time for acceptance or payment, and to give notice in the event of its dishonor to the drawer. If he fails to make such presentment or to give such notice the drawer is not only *discharged from liability on the bill, but also from the debt or consideration, for or on account of which it was given*. 2 Dan. Neg. Instr., § 1276. To the same effect are the cases of *Dayton v. Trull*, 23 Wend. 345. *Jones v. Savage*, 6 id. 658.

It only remains to consider the latter branch of the instruction, the effect upon the rights of the parties and their relations as creditor and debtor, of the writing given by Howes at the maturity of the first draft. Whatever is the fair and reasonable interpretation to be put upon the words of this instrument, and whatever would be their force and effect in an action brought against Howes himself, it is quite certain they cannot be allowed to enlarge the liabilities of the defendant, or to deprive him of any just defense against the plaintiffs' demand. The drafts were the *personal* acts of the managing and settling partner, and not less so was his subsequent consent to the extension of the time of payment by the holder. The partnership was at an end, and his authority was restricted to what was necessary in settling the business. He had no power to bind his associate by new contracts not required for that end. The agreement seems to be a mere gratuity, and can bind no one but himself.

"Partners after dissolution," says Judge STORY, "cannot contract new debts, but may pay and collect debts, apply the partnership funds and effects to the discharge of their own debts, adjust and settle the unliquidated debts of the copartnership, receive any

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property belonging to the partnership, and may make due acquittances, discharges, receipts and acknowledgments of their acts in the premises." Story on Part., § 328.

Retiring members of a firm are not bound by instruments negotiated in the name of the original firm, after its dissolution, even though they are negotiated by the partner authorized to settle the partnership business. Collyer on Part., § 541; 1 Tudor's Lead. Cases, Mercantile and Maritime Law; notes in *Waters v. Taylor*, 2 Ves. & B. 299; s. c., 89 Law Lib. 635; *Evans v. Drummond*, 4 Esp. 89.

The principle applies with greater force for the protection of a dormant than an active and known partner, whose name is associated with the partnership business. The former is chargeable to third persons only on contracts entered into while the firm was in operation, and he was sharing in the emoluments and profits of the joint business, and his liability as such ceases on his retirement, even without notice, for the reason that those dealing with the partnership have never trusted to his credit, and his liability grows out of the fact that he is a contracting party, taking a part of the profits of such contracts. Collyer on Part., § 536; Ross on Sur. Ag. Part. & Ins.; 89 Law Lib. 635.

This view of the case, though contained in the instructions asked for defendant, was not presented in the charge to the jury, and as the defendant was entitled thereto, there must be a new trial.

Error.

Venire de novo.

TEW v. TEW.

(80 N. C. 816.)

Divorce — adultery after separation.

Under the statute allowing a divorce only to a party "injured," the adultery of the wife committed after a separation caused by default of the husband will not avail him to dissolve the bonds of matrimony.

ACTION for absolute divorce. The facts are stated in the opinion. The defendant had judgment below.

Tew v. Tew.

J. D. Kerr, for plaintiff.

W. S. & D. J. Devane, for defendant.

DILLARD, J. The husband seeks a divorce *a vinculo matrimonii*, and in his petition puts his case on the ground of a separation from him by his wife and alleged adultery of the wife before and after the separation; and the wife denies that she separated from her husband, and also denies the adultery charged. The jury in response to issues submitted to them find that the wife did not separate herself from her husband, but that the husband separated himself from the wife; that the wife was not guilty of the adultery charged against her, prior to the separation, but was guilty after the separation; and on the facts as thus found his honor held that the plaintiff was not entitled to a decree dissolving the marriage. We concur with his honor.

Marriages may be dissolved on the application of the injured party for the cause of adultery in two cases,—first, if either party shall separate from the other and live in adultery; and second, if the wife shall commit adultery. Bat. Rev., ch. 37, § 4. To entitle the husband to a divorce in the first case, two things must occur, to wit, separation by the wife without default of the husband, and a living in adultery by the wife; and the jury find but one of the requisites—adultery by the wife since the separation; and as to the other essential fact they find that separation was the act of the husband, and that the incontinence imputed to the wife as prior to the separation was untrue, and it is obvious therefore that the plaintiff's application for divorce is not within the first class of cases mentioned above.

But the plaintiff insists that his wife has *committed adultery*, and although committed only *since* the separation, he is entitled to have a divorce under the second class of cases enumerated in the section aforesaid of Battle's Revisal. The clause of the statute is a new provision, and first introduced into our law at the session of the legislature of 1871-'72, and no case has arisen calling for its exposition and construction. It is in terms absolute, and separately considered it would seem to make the adultery of the wife good ground of divorce whensoever committed, whether before or after separation, and howsoever committed, whether in consequence of, or without the default of the husband. But this provision in the opinion of this court is to be considered in connection with the

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declaration in the same statute, that divorces are to be granted on the application of the party *injured*; and thus limited, no husband can have the bonds of matrimony dissolved by reason of the adultery of the wife committed through his allowance, his exposure of her to lewd company, or brought about by the husband's default in any of the essential duties of the married life, or supervenient on his separation without just cause. *Whittington v. Whittington*, 2 Dev. & Bat. 64; *Moss v. Moss*, 2 Ired. 55.

In *Wood v. Wood*, 5 Ired. 674, it is held, that if a divorce be sought on grounds occurring after separation, it is indispensable that the party asking it shall show that he or she did not separate, or if he or she did, that it was unavoidable and made necessary by the conduct of the other party.

Now by the verdict of the jury it is established that the husband separated himself from the wife upon a charge of adultery before the separation, which is found to be untrue, and the default of the husband in withdrawing all conjugal society from the wife and throwing her out upon the world stained with a false imputation, in the opinion of this court, disables him to avail himself of the wife's subsequent adultery as a ground to dissolve the bonds of matrimony.

No error.

Affirmed.

STATE V. DAVIS.

(30 N. C. 351.)

Criminal law — affray — trespass on public road.

The public have only an easement in a highway to pass and repass along the same, and when one stops in the road and uses loud and obscene language, he becomes a trespasser, and the owner of the land has the right to abate the nuisance which he is creating; and in case the trespasser is armed with a pistol and acting in a belligerent manner, the principle of *molliter manus* does not apply.*

CONVICTION of an affray.

The opinion contains the facts. The court charged: "Should the jury find that defendant Davis while in a public highway passing over lands of which Mrs. Laws was in possession, or while out

*See *Adams v. Rivers*, 11 Barb. 390, note to 25 Am. Rep. 536.

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of the highway, but on such lands, used obscene, vulgar and profane language to the annoyance of men and women in the house of Mrs. Laws situated near by, and that defendant Lassiter was her son and lived in said house with his mother, and that he struck Davis for the purpose of suppressing said annoyance, and used no more force than was necessary for that purpose, you will find him not guilty."

Attorney-General, for the State.

T. M. Argo, for defendant.

ASHE, J. The defendant and one Evans were quarrelling near the dwelling-house of Mrs. Laws in a public road running over her land. The defendant, armed with a pistol, which he had in his hand, was vamping, cursing, and using very vulgar language in the hearing of the inmates of the house. Lassiter, who was the son of Mrs. Laws and lived with her, came out with an ordinary walking stick in his hand and remonstrated with the defendant, who still holding his pistol cursed and denounced him, saying he was in the public road and he would curse as much as he pleased. After the interchange of a few words, the lie was given by defendant, and Lassiter struck him with his stick, when the defendant attempted to use his pistol but was prevented by those present.

He seems to have rested his defense upon the ground that he was in the public road and had the right to do there as he pleased. In this he was mistaken. The public have only an easement in a highway, that is, the right of passing and repassing along it. The soil remains in the owner, and where one stops in the road and conducts himself as the defendant is charged to have done, he becomes a trespasser, and the owner has the right to abate the nuisance which he is creating. The principle of *molliter manus* does not apply to a case like this, where the trespasser armed with a pistol is acting in such belligerent defiance. See *State v. Buckner*, Phill. 558.

The defendant used language which was calculated and intended to bring on a fight, and a fight ensued. He is guilty. *State v. Perry*, 5 Jones, 9; *State v. Robbins*, 78 N. C. 431.

We find no error in the charge given by his honor to the jury. Let this be certified, etc.

PER CURIAM.

No error.

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STATE V. PETTIE.

(80 N. C. 367.)

Constitutional law — cruel and unusual punishment.

A husband having beaten his wife in great excess, without excuse or provocation, and to such a degree of cruelty as to indicate malice toward her, held, that a sentence of imprisonment for two years in the county jail, on his conviction for the assault and battery was not in violation of the constitutional provision against cruel and unusual punishments.

CONVICTION of assault and battery by defendant upon his wife, and sentence of imprisonment in the county jail for two years. The defendant, after being absent from home in the morning, on his return in the afternoon, inquired of his wife if one Sluder had been at his house and left any tobacco for him, and on being told he had not, he called his wife a liar and commenced to beat her with a stick larger than the middle finger, and continued to beat her until her left arm, shoulder, and back were covered with bruises; the beating occurred about four weeks before the trial, and she had been and was still unable to use her left arm at all, and was hardly able to be present in court. The wife said she had not indicted her husband, that he had whipped her before, and threatened to kill her if she caused him to be arrested. The father and mother of the wife were at defendant's house on the next day, and found her in bed and unable to raise herself up without assistance; they cut off her dress and found her left arm very much swollen, and her person covered with bruises; they then carried her to their house, and she had been totally unable to do any work since the beating, and was brought to court with great trouble.

Attorney-General, for the State.

C. M. McLoud, for defendant.

DILLARD, J. It is the settled law of this State that the courts will not invade the domestic forum or interfere with the right of a husband to control and govern his family; and from motives of public policy, even if a husband should chastise his wife, it is regarded as best not to take any cognizance thereof, unless some

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permanent injury be inflicted, or there be an excess of violence, or such a degree of cruelty as shows that the chastisement was inflicted to gratify his own bad passion. *State v. Rhodes*, Phil. 453. In this case there was no provocation whatever, so far as we can gather from the case of appeal. We are therefore to take it that the battery of the wife was without excuse, and unprovoked. And it is further aggravated by the fact that it was inflicted in great excess and to such a degree of cruelty as to indicate malice against her, and to disable her very seriously and perhaps permanently. Upon the facts as above recited, the conduct of the defendant was brutal, and such as to call for exemplary punishment, adequate to correct him and to deter all others from offending in like manner. There being no specific punishment provided by statute for such an offense, it was the duty of the judge in the exercise of his legal discretion to fix upon the term of imprisonment suited to the case without restriction save that in the Constitution which forbids "cruel or unusual punishments" to be inflicted.

His honor pronounced judgment of imprisonment for two years in the county jail, and thereupon the question is made — whether the punishment inflicted be or be not in violation of the Constitution, art. 1, § 14. It was intimated in *Miller's* case, 75 N. C. 73, and since then decided in *Driver's* case, 78 id. 423, that an imprisonment for five years was excessive and in violation of the Constitution for any misdemeanor at common law. In the latter case, the court, in speaking of the limit to the power of the judge to punish, say, "what the precise limit is cannot be prescribed. The Constitution does not fix it, precedents do not fix it, and we cannot fix it, and it ought not to be fixed. It ought to be left to the judge, who inflicts it under the circumstances of each case, and it ought not to be interfered with except when the abuse is palpable." The case of the defendant is an unusual one in its features, and it called for a punishment unusual in its kind and duration. He whipped his wife without provocation, excessively and cruelly, and inflicted most likely a permanent injury on her. He had whipped her before, and had put her under fear of death if she had him arrested. When such maltreatment appears and it is clearly evinced that the husband acts wantonly and for the gratification of malice, it is difficult to say how long an imprisonment may be adjudged without violating the Constitution. In respect to the kind and quantum of the punishment, regard is always to be had

to the circumstances as developed on the trial; and the judge presiding has the opportunity to know the case better than an appellate tribunal. Therefore it is to be assumed in this case that his honor could understand and see the extent of the injuries inflicted and the motives operating on the defendant, and properly weigh any matter in mitigation, and thus be enabled to decide upon the propriety of the punishment to be suffered for the protection of the wife, and through it, for the protection and good order of society.

We will not undertake to fix upon the extent to which a judge in his discretion may go in inflicting punishment for an assault and battery. We simply decide that the judgment in this case was not unwarranted. There is no error. Let this be certified that the court below may proceed to execute the sentence of the law.

PER CURIAM

No error.

STATE V. MCGIMSEY.

(80 N. C. 377.)

Criminal law — discharge of jury before verdict.

Where a jury, in a capital case, retired at 12 o'clock on Saturday night for deliberation, and were discharged at 6 o'clock the next evening, before verdict, because "it appeared they could not agree," *held*, that the prisoner was entitled to be discharged, although the term expired on Saturday.

PETITION for a writ of *certiorari*. The petitioner was tried for murder. The opinion states the facts.

T. F. Davidson, attorney-general, and J. L. Henry, for the State.

Carter, Merrimon, and McLoud, for the prisoner.

ASHE, J. The question presented for the consideration of this court is, whether the court below had the right to discharge the jury who were impanelled in the case, and hold the prisoner for another trial.

It is a maxim of the common law that no person shall be twice put in jeopardy of life or limb; and this principle, founded in hu-

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manity, has been incorporated in the Constitution of the United States. It has been adopted and acted upon in our courts from the foundation of the government to the present time. We are aware that in many of the States there has been a strong tendency to ignore the maxim of the common law and submit the question to the discretion of the courts. But in this State, beginning with *Garrigues'* case in 1795, reported in 1 Haywood, through a current of decisions down to the case of *State v. Honeycutt*, 74 N. C. 391, the principle of the common law has been steadily kept in view and adhered to, with some relaxation of the rule. *State v. Spier*, 1 Dev. 491; *State v. Ephraim*, 2 D. & B. 162; *State v. Prince*, 63 N. C. 529; *State v. Alman*, 64 id. 364; *State v. Jefferson*, 66 id. 309.

By these and other decisions of this court, it has been uniformly maintained that where a jury has been charged in a capital felony and the prisoner's life put in jeopardy, the court has no power to discharge the jury and hold the prisoner for a second trial, except in cases of absolute necessity. These cases of necessity form exceptions to the general rule, and in every case where the court undertakes to exercise the power of discharging a jury in a capital case, it will be error unless brought within one of the exceptions. The inability of a jury to agree upon a verdict has been recognized by our courts as an exception to the general rule. See cases of *Jefferson*, *Prince*, and *Honeycutt*, *supra*.

In *Jefferson's* case the prisoner was discharged, but PEARSON, C. J., in the opinion of the court, says: "If his honor had remained at court ready to instruct the jury, and had found the fact that the case had been with the jury four days, and that from declarations of jurors in the presence of the others and in open court, before him, he was satisfied the jury would not agree, and that it was useless and unnecessary for the purposes of the case to continue the term longer, and had thereupon discharged the jury, there would have been no error;" and in *Honeycutt's* case in giving the opinion he said the conditions laid down in *Jefferson's* case had all been complied with: "The case had been with the jury for six days, and his honor, not content with the declarations of some of the jurors in presence of each other in open court before him, polls the jury on that question, and on this evidence finds as a fact that the jury could not agree and orders a discharge of the jury and the prisoner be held for trial at the next term." And he proceeded to say "that the supposed facts in *Jefferson's* case were fully considered by the

members of the court, and although that is a *dictum* or rather matter used for illustration, after full consultation we now hold it to be the law of the land." This *dictum*, then, is the law of this State, and the last expression of judicial determination on this subject. Let us then see if in the present case there has been a compliance with the conditions laid down in that *dictum*.

From the record it appears that the jury were impanelled in the case on Thursday evening of the second week of the term, and the arguments were closed and the jury retired to make up their verdict between twelve and one o'clock on Saturday night, and his honor for the purpose of the trial had the court adjourned until the next morning, Sunday, at nine o'clock, when it being ascertained that the jury had not agreed, the court was adjourned until six o'clock, P. M. At two o'clock the jury sent for the judge and requested further instructions, and after receiving them, two of the jurors, in the presence of the others and before his honor in open court, said, with that instruction they were satisfied they would never agree; and as they were retiring, his honor in their hearing said, "we will meet again at six o'clock and see what can be done;" and at six o'clock the jury were called in and asked in the usual form by the clerk, if they had agreed, and their response through their foreman, was, that they had not. His honor states that he prepared the order for withdrawing a juror and ordering a mistrial before he went to the court-house at six o'clock, and had determined to order a mistrial if the jury should announce that they had not agreed, and it should not appear probable that they would agree. And when the jury did announce they had not agreed, he signed the order and had it spread on the record. The statement in this order that "it appearing the jury cannot agree" is not a finding of the fact that the jury cannot agree so as to be a compliance with the conditions of the *dictum*. Nor is it helped by the return of his honor to the *certiorari*, which is to be regarded as a part of the record. For when the jury came in at two o'clock and the judge gave them the instructions asked, two of the jurors only, without consultation with their fellows, said they could never agree. His honor was not satisfied then that they could never agree, for he sent them to the jury room for further deliberation, and when they came in at six o'clock and in response to the question by the clerk announced that they had not agreed, his honor could not then have been satisfied they could not agree, for they

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were not polled, nor even asked the question if they were likely to agree, and a juror was withdrawn and a mistrial had by an order which his honor had drawn up before he went into the court-house at six P. M., he having determined to order a mistrial if it was probable the jury could not agree. The amount of the finding is that it was probable the jury would not agree upon a verdict. That does not meet the requirement of the law. His honor should have found the fact distinctly and set it out in the record, that the jury could not agree, or he was satisfied they never would agree, and that it was unnecessary to prolong the term for the purposes of the trial, before he undertook to exercise the power of withdrawing a juror and ordering a mistrial. It was his duty to find the facts and place them on record; and these findings of the court below are conclusive and not the subject of review here, but the decision of his honor as to the law arising upon them may be reviewed and reversed. *State v. Wiseman*, 68 N. C. 203; *Prince and Jefferson*, *supra*.

The expiration of the term was no ground for discharging the jury; for it is provided by statute that "in case the term of a court shall expire while a trial for felony, etc., shall be in progress, and before judgment shall be given therein, the judge may continue the term as long as in his opinion it shall be necessary for the purposes of the case." Bat. Rev., ch. 33, § 108. It was under the authority of this provision that his honor continued the term until Sunday, and perhaps if he had continued the term for two or three days longer, the jury would have agreed, for we have instances of their coming to an agreement after several days of deliberation. In *Adair's* case, 66 N. C. 298, they were kept together from Saturday evening until the following Wednesday and agreed. In *Taylor's* case, 76 N. C. 64, they were deliberating several days, and came to an agreement. His honor might well have continued Buncombe court until the following Wednesday, consistently with his duty and the law; for Madison court which was to begin on Monday after Buncombe court would by law have been adjourned by the sheriff from day to day until sunset of the fourth day. Bat. Rev., ch. 17, § 396.

[Omitting minor points.]

We think the ancient rule of the common law has been sufficiently relaxed by our predecessors, and we are unwilling to move a step further in the direction of discretion. We abide the law as

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we find it established, acting upon the principle of *stare decisis*, and governed by this principle after a careful and deliberate consideration of this case, we are of the opinion that the state of facts set out in the record does not show the existence of a necessity for the discharge of the jury. In coming to this conclusion, we are aware that its effect may possibly be to turn loose a bad man upon society, but it is better in the administration of the law there should be an occasional instance of violence even to the sense of public justice, than that a principle should be established which in times of civil commotion that may occur in the history of every country would serve as an engine of oppression in the hands of corrupt time servers and irresponsible judges to crush the liberties of the citizen. The prisoner, Charles P. McGimsey, is entitled to his discharge. Let this be certified, etc.,

PER CURIAM.

Prisoner discharged.

STATE V. CHADBOURN.

(80 N. C. 479.)

Taxation — "trader" — manufacturer.

A trader is one who sells goods substantially in the form in which they are bought, and who has not converted them into another form of property by his skill and labor; therefore, one who carries on the business of buying timber and converting it into lumber for sale is a manufacturer, and not liable to indictment for failure to pay a tax and obtain a license as a "trader."

INDICTMENT for violation of the following provisions of the Revenue Act. "Every merchant, jeweller, grocer, druggist, and every other *trader* who as principal or agent carries on the *business of buying or selling goods, wares or merchandise* of whatever name or description, except such as are specially taxed elsewhere in this act, shall in addition to his *ad valorem* tax pay as a privilege tax, five dollars and one-tenth of one per cent on the total amount of purchases in or out of the State, for cash or on credit; but no retail merchant shall be required to pay any tax on purchases made from wholesale merchants residing in this State." "Every person who shall practice any trade or profession, or use any

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franchise taxed by the laws of North Carolina, without having first paid the tax and obtained the license as herein required, shall be deemed guilty of a misdemeanor," etc. The indictment alleged that the defendants "did unlawfully follow the trade of timber and lumber merchants without having paid the tax and obtained the license therefor required by law." The jury found that "the defendants are partners under the firm name of James H. Chadbourn & Co., and are the owners of a large steam saw and planing mill in the city of Wilmington. Their sole business is to buy timber and convert the same by sawing and planing into lumber and boards, which they sell in the market. They do not sell timber, and do not buy lumber. There are certain persons well known in the trade as lumber merchants, who buy lumber to sell again, but the defendants are not of that class." The defendants were discharged.

Attorney-General, for the State.

E. S. Martin, for defendant.

SMITH, C. J. The judge before whom the cause was tried was of the opinion that the employment and business in which the defendants were engaged did not bring them within the prohibition of the statute, and ordered their discharge. The appeal brings before us the question, whether the defendants are included in any of the descriptive words of section twelve, "merchants, jewelers, grocers, druggists, or other trader who carries on the business of buying or selling goods, wares, or merchandise"; in other words, are they *traders* within the purview and meaning of the act? We concur in the opinion of the judge in the court below that they are not. Words used in a statute bear that sense in which they are understood in the common business of life and in the intercourse of men. Their meaning is ascertained from general use. A *trader* as defined by an eminent lexicographer "*is one engaged in trade or in the business of buying and selling*," and such is the popular acceptation of the term. The goods are sold substantially in the form in which they are bought, and the difference between the sums paid and received constitutes the profit of the business. The defendants' occupation does not answer this definition. They are rather manufacturers who by skill and labor convert what they get into another and more valuable form of property. The manufacturer of shoes purchases the leather and other materials from which they are made, and

then sells them at a large advance. He both buys and sells them at a large advance. He both buys and sells, but he is not a trader. So with the defendants who purchase the tree or log and dispose of the lumber and boards which are made from it. They do not buy and sell the same article and in an unchanged condition. The manufacturing process intervenes, and this gives name and character to their pursuit. The statute obviously refers to a different class of business men, in imposing the license tax in this clause. The meaning is also manifest from the preceding and associated words. Merchants and the others named are such as buy and sell for profit, without transforming the article into something else to which their labor and skill have imparted a higher value. The word, though of more comprehensive scope than those preceding, belongs to the same general class. *Noscitur a sociis* is a rule of interpretation applicable to the case.

It is true the act speaks of those who carry on the business of *buying or selling*, using the disjunctive preposition and separating the one act from the other, and apparently making each a distinct offense; but still, they are traders who buy or sell, and not others of a different calling. Though by a strict interpretation either act, buying or selling, without a pre-payment of the tax and a license, may be a misdemeanor and punishable as such, still they must be *traders* who buy or sell, and not others who follow a different occupation. The offense is consummated only when the act of buying or selling is done by one whose business it is to buy and sell, and in the exercise of his calling. This interpretation relieves the statute from many of the difficulties pointed out in the elaborate argument of defendants' counsel. But if it were necessary in a law so highly penal, the sentence might perhaps admit of a construction which substitutes the copulative in place of a disjunctive word and thus make this harmonious with the other provisions of the act. But we do not deem it necessary to change the phraseology of the sentence to give it full operation and effect according to the obvious intent of the framers of the law.

That the mere act of selling without a previous buying by one who is not a trader is not within the contemplation of the act, is manifest in the fact that the per centum tax to be paid is imposed only on the amount of purchases, and in the case supposed could not be collected at all. And if the act of selling by those who are not traders without the license is not an offense, neither for the

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same reason can the act of buying be an offense. We will not pursue the discussion further, nor do we deem it necessary to cite authorities in support of our conclusions.

It will be noticed that no specific act is charged in the bill, the averment being that the defendants did at a certain day and place "follow the trade or profession of timber and lumber merchants." We do not wish to be understood as holding that an averment in terms so general is sufficient to describe the offense. Perhaps it could not be set out in a more precise and specific form. We advert to the matter only to say as it is not necessary we express no opinion on the point. The special verdict does not sustain the allegations in the indictment, nor do the facts found bring defendants within the penalty of the act. This will be certified, etc.

No error.

Affirmed.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

HOUSTON AND TEXAS CENTRAL RAILWAY CO. v. MOORE

(49 Tex. 81.)

Carrier — liability for injury to passenger on freight train.

A passenger on a freight train of defendant was killed by an accident while so riding. The defendant's conductors were forbidden to allow passengers on freight trains, and the deceased knew that regulation. He was on the train with the conductor's consent, but it did not appear that he paid fare. *Held*, that it could not be presumed that the defendant had contracted to carry the deceased as a passenger, and no action would lie for his death.*

STATUTORY action of damages for negligence resulting in death. The facts appear in the opinion. Judgment below for plaintiff.

Goldthwaite & Turner, for plaintiff in error.

Waller, Cook, Harris & Masterson, for defendant in error. Unless deceased was a trespasser, the judgment was right. *Dunn v. Grand Trunk Ry.*, 58 Me. 187; s. c., 4 Am. Rep. 267; *Steamboat New World v. King*, 16 How. 469; *Phila. & Read. R. R. v. Derby*, 14 id. 468.

* See *Creed v. Penn. R. R. Co.* (86 Penn St. 130), 37 Am. Rep. 603.

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MOORE, J. [Omitting statutory and minor matters.] It is also insisted, by the appellant, that the judgment is erroneous and should be reversed, because appellee's husband, when injured, was not a passenger, but was, as he well knew, wrongfully on appellant's cars.

It appears, on the face of appellee's petition, that the deceased, when he received the injuries which caused his death, was on a freight train. The evidence shows that there was no person on said train but the employees of appellant, except the deceased, who had been an engine-driver, running a train on appellant's road for a year or two, until about a month or six weeks previous to his death, and well knew that passengers were not allowed to travel on freight trains on appellant's road; that the officers in charge of such trains were forbidden to allow parties to ride upon them without a special pass from the general superintendent of the road; that no such pass could be gotten without a release of appellant from damages in case of accident; that this was the condition upon which permits to ride upon freight trains were given, because of the greater risk of accidents to passengers on freight trains than on passenger trains, and because the company would not assume such risks on behalf of persons desiring to travel in this unusual and extra hazardous manner.

On the other hand, it cannot be doubted that deceased was riding on the train with the knowledge and consent of the conductor. But whether he paid fare, or had a pass or permit to travel on a freight train, is not shown.

Under this state of case, the question to be determined is, whether appellant had assumed the risk of a common carrier of passengers in respect to the deceased, while thus riding upon its freight train; or in other words, whether deceased was, in contemplation of law, a passenger on appellant's train; or if not such passenger, strictly speaking, whether the assent of the conductor to his getting upon the train gave him the right to ride upon it, and render appellant responsible for any injury done him while thus on the train, to which he in no manner contributed.

Appellant, as a railway company, is a common carrier of both freight and passengers; but has, unquestionably, the right to make reasonable regulations for conducting its business; and parties dealing with it must conform to such regulations. That a regulation of a railway company, that freight and passengers will be car-

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ried on its road in separate trains, is a reasonable regulation, can hardly be doubted by any one. Indeed, it seems a highly salutary regulation, for the public as well as the company. Nor can it be controverted, when a railroad company makes other suitable provision for passenger travel, that no one has the right to demand that he shall be allowed to ride in its trains devoted exclusively to the carrying of freight. If a party, in violation of such regulation, and without the consent of the company, forces himself into one of its freight trains, it surely cannot be supposed that the company could be held responsible for him in its character as a carrier of passengers; or that the party who should thus contribute to the injury which he might sustain while thus wrongfully in the train may maintain an action against the company for such injury. Unless he could, an action cannot be maintained under the statute by his heirs, representatives, and relatives, in case of his death.

It may be true, where a railroad company habitually permits passengers to travel on its freight trains, notwithstanding it may by regulation prohibit it, that the company will incur the same responsibility to such passengers as if they were on the regular passenger cars. But when it is shown that the regulations of the company absolutely forbid passengers riding on freight trains, and where there are no cars attached to such trains except those ordinarily accompanying trains exclusively for freight, or such as, by their appearance and manner in which they are fitted up, could not be properly regarded as inviting passengers into the train, the burden of proving that the party injured was justified in going upon such train as a passenger, properly devolves upon those who sue for damages resulting from injuries sustained by him while on such train. Do the facts in this case show that appellant permitted passengers to travel on its freight trains, notwithstanding its regulation prohibiting it, to an extent or in a manner to warrant the deceased in supposing that he was authorized to get upon its freight train as a passenger? Certainly they do not.

If, then, it can be inferred that the deceased was properly on the train, it must be upon the supposition that he had a special permit; or that the conductor of the train was authorized to annul or waive the regulation of the company prohibiting passengers from traveling in freight trains. But the evidence shows that the conductor had no such authority, and that the deceased must have known that he had not.

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This is not the case of an ordinary traveller, unacquainted with the regulations of the railroad, or if acquainted with them at all, only in a general way; or of one who is uninformed as to the powers and functions of the officer in charge of the train, and who, if he knew that passengers had been sometimes carried by such train, might suppose that the officer in charge of it had authority to relax or set aside the rule in special cases; which seems to be the extent to which the case of *Dunn v. Grand Trunk Railway*, 58 Me. 187; s. c., 4 Am. Rep. 267, relied upon by appellee, goes, — but which, even on its facts, seems to be greatly questioned by Judge REDFIELD, the distinguished commentator on railroad law (Redf. Am. Railroad Cases, 490); and to have been denied by the New York commissioners of appeal, in the case of *Eaton v. The Delaware, etc., R. R. Co.*, 57 N. Y. 382; s. c., 15 Am. Rep. 513. Here the deceased, who, only a short time previously to his going on the train, had been in the employment of appellant, must have known that the conductor was forbidden to allow him to travel as a passenger upon the train.

It cannot, in view of all the facts of this case, be said that appellant had undertaken or contracted with the deceased to carry him as a passenger over its road, or that we are warranted in saying the *prima facie* presumption that the deceased was wrongfully upon appellant's train, when he received the injuries which caused his death, has been rebutted; and, if death had not ensued, that he could have maintained an action against appellant on account of the injuries which he received by the wreck of the train. The judgment must therefore be reversed and the cause remanded. And it is so decreed.

Reversed and remanded.

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(49 Tex. 88.)

Contract — validity — note for profits of an illegal business.

A note, given on the completion and settlement of an illegal business, by one of the partners therein to the other, for profits thereof, is valid and enforceable. (*See note, p. 106.*)

ACTION on promissory notes. The facts sufficiently appear in the opinion. Judgment below for plaintiff.

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F. E. McManus and *Ballinger, Jack & Mott*, for appellant, cited 1 Greenl. Ev., § 63, 254, 573b, and note, 577; *Crozier v. Kirker*, 4 Tex. 252; *Burnley v. Rice*, 18 id. 481; *Arrington v. Sneed*, id. 140.

Wm. H. Russell, for appellees.

MOORE, A. J. The only material question presented by the assignment of errors in this case relates to the exclusion of the evidence offered on the trial in the court below, to prove that the notes, which are the foundation of the action, were given by the appellant's intestate, Manuel Leon De Leon, to appellees, on a settlement and liquidation of a business enterprise in which said De Leon and appellees, Treviño & Bro., had been jointly engaged, during the war between the United States and the Confederate States, for introducing merchandise from Matamoras, Mexico, into Texas, and its sale or conversion here into cotton, to be transported to Mexico, and which said enterprise, it is alleged, was contrary to public policy and in violation of the law of the United States, etc.

Where competent evidence, tending to establish the truth of the petition or answer, has been excluded by the court below upon an untenable objection made to it by the other party, it is ordinarily no answer to an assignment of error to the ruling of the court, to show that the petition or answer under which the evidence was offered is defective. But where no ground of action or defense whatever is presented by the pleadings, and it is obvious from the nature of the case that the defect could not be cured or avoided by an amendment, and had the desired evidence been admitted, that the opposite party would have been entitled to a judgment *non obstante veredicto*, the error in excluding the testimony is abstract and immaterial, and furnishes no sufficient ground for the reversal of the judgment. Such, we think, is the character of the defense relied upon and sought to be established by appellant in this case.

If it should be conceded (which, however, I can by no means do) that the contract between appellees and De Leon for the introduction, during the war between the United States and the Confederate States, of merchandise from Matamoras into Texas, and the purchase and exportation of cotton from Texas to Mexico, without passing such merchandise and cotton through the custom-house of the United States, or a compliance in any way whatever with its revenue laws, or the rules and regulations to which all

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persons subject to its authority were required to conform, pending hostilities, in all communication or intercourse with the inhabitants of or others within the Confederate lines, should be held to be in violation of the laws of the United States and against public policy, and that neither party to such contract could have obtained the aid of the court for its enforcement, or could maintain an action for a breach of any of its conditions or stipulations by the other, it does not tend to support appellant's defense, and is of no moment in correctly determining the present case.

This action is not founded upon the alleged illegal contract, nor was it brought to enforce any of its stipulations or conditions. The illegal enterprise, if it was illegal, in which De Leon and appellees were engaged, and all the matters connected with it, were voluntarily settled and adjusted by them. True, the notes upon which the suit is brought were given by De Leon in such settlement. But if a contract is illegal, certainly it does not follow that it is illegal or immoral for the parties, after its completion, to fairly settle and adjust the profits and losses which have resulted from it. The vice in the contract does not enter into the settlement so that all contracts and undertakings based upon, or growing out of, the settlement, confer no rights which the courts will respect or enforce. By her answer, appellant sought to be relieved against an executed contract, upon the ground that her intestate had been engaged with appellees in an illegal enterprise. But she is not entitled to relief upon such ground. If the notes sued upon had been given to carry on the illegal enterprise, instead of in settlement of it, the taint of the contract would have attached to the notes, and appellees could not maintain an action upon them. But the answer merely shows, that, by reason of the illegal character of the enterprise in which the parties had been engaged, appellant's intestate could not have been forced to an accounting with appellees, or to pay or give his notes for the amount found to be due from him to appellees on such accounting. This, however, is no reason why an action may not be maintained on notes given for the amount found to be due on a voluntary settlement of the illegal partnership enterprise. And it has often been, in effect, so held in this as well as other courts.

In the case of *Brooks v. Martin*, on a bill in equity, by one partner against the other, to set aside a contract of sale of his interest in the partnership venture, the Supreme Court of the United States

held, that “after a partnership contract confessedly against public policy has been carried out, and money contributed by one of the parties has passed into other forms, the results of the contemplated operation completed, a partner in whose hands the profits are cannot refuse to account for and divide them, on the ground of the illegal character of the original contract.” 2 Wall. 70. Now, surely, if the court will lend its aid to compel an accounting, and enforce the payment of the amount found to be due by one partner to the other, it cannot be that it should interpose to relieve one of the partners from a contract resulting from his voluntary accounting, on the ground of the illegality of the original partnership enterprise, which, after completion, had been thus voluntarily settled and adjusted.

In the case of *The Planters' Bank v. The Union Bank*, 16 Wall. 483, the court again says: “Nor should the court have charged that in the circumstances of this case, no action would lie for the proceeds of the sales of Confederate bonds which had been sent by the plaintiffs to the defendants for sale, and which had been sold by them, though the proceeds had been carried to the credit of the plaintiffs, and made a part of the account. It may be that no action would lie against a purchaser of the bonds, or against the defendants, on any engagement made by them to sell. Such a contract would have been illegal. But when the illegal transaction has been consummated; when no court has been called upon to give aid to it; when the proceeds of the sale have been actually received, and received in that which the law recognized as having had value; and when they have been carried to the credit of the plaintiffs, the case is different. The court is then not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case.”

So in *Sharp v. Taylor*, 2 Phillips' Ch. 801, where a bill was filed to recover a moiety of freight-money, the whole of which had come into the hands of one of the joint owners of the vessel. The defense was, that the trade in which the vessel had been engaged, and in which the freight had been earned, was illegal, and in violation of the navigation laws. But the chancellor, Lord COTTINGHAM, said: “Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that in realizing it some provision in some act of Parliament has been violated? The answer is, that the transaction alleged to be illegal is completed and

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closed, and will not be in any manner affected by what the court is asked to do as between the parties."

Is this not, we ask, equally true in this case? The partnership enterprise in which appellees and De Leon had been engaged had been fully completed before they had voluntarily adjusted, as between themselves, its results. If the enterprise had been successful, and De Leon, who had been the active partner, had been found to be indebted to appellees for profits, under the authority of cases to which we have referred, an action might have been maintained against him by appellees for their share of them. By the terms of the partnership, appellees were to furnish the goods, and De Leon was merely to contribute his personal services, and the profits and losses were to be mutually divided. Does it make any difference that the notes sued on were given in liquidation of the portion of losses and merchandise which on settlement with De Leon was found to be due appellees, instead of their being given for profits? If there had been no settlement of the copartnership affairs; if there had been no new contract, it may be that appellees could not maintain an action for a contribution to liquidate the losses incurred, or for the recovery of their half of them, if they had paid them all; though the cases to which we will refer seem to imply that they might, and certainly hold that they could have recovered if such losses had been paid at his request or express consent. In such case, it might be said that the action was upon the original illegal contract. But by the voluntary settlement and adjustment of the partnership affairs, and the giving of the notes sued upon, the illegal transaction was completed and closed, and an entirely new undertaking entered into. The express undertaking by De Leon to pay appellees for the losses which they had incurred, which may represent liabilities of the partnership for which they were bound or have assumed to discharge at request of De Leon, would seem to be supported by as adequate consideration as an implied promise to pay profits resulting from a similar partnership transaction.

In the case of *Finkney v. Reynous*, 4 Burr. 2069, where two persons were jointly concerned in an illegal stock-jobbing business, which resulted in a loss, one of them paid the entire loss, and took a security from the other for his share. The security was held to be valid as a new contract, uninfected by the original transaction. And in *Petrie v. Hannay*, 3 T. R. 418, one partner, who had paid

the whole loss at the instance of the other, was held entitled to the recovery of one-half of the amount so paid.

These cases, it is true, have been questioned, but nevertheless we find them referred to with approval, as we state them, by the Supreme Court of the United States, and cited as authority by this court. *Armstrong v. Toler*, 11 Wheat. 258; *McBlair v. Gibbs*, 17 How. 238; *Brooks v. Martin*, 2 Wall. 70; *Bogges v. Lilly*, 18 Tex. 200; *Mills v. Johnston*, 23 id. 308.

And in a case where plaintiff and defendant, dealing faro in partnership, became indebted by losses to other parties, and the plaintiff, in consideration that the defendant had paid and assumed payment of these losses, gave the defendant his note for his share of them, this court held that the consideration of the note was not unlawful, and that the defendant was entitled to a judgment upon it. *Bogges v. Lilly*, 18 Tex. 200.

These cases, we think, clearly show that a contract or undertaking to pay either profits or losses incurred in an illegal enterprise cannot be impeached by showing that the partnership enterprise in which such profits or losses accrued was illegal. That they are collateral to, and not a part of, the illegal contract which had been by voluntary settlement fully completed and ended before the contract or undertaking upon which the suit is brought was entered into. Such contracts are, therefore, regarded by the courts as standing upon an altogether different footing from a renewal of, or a new security given for, an original illegal contract.

There is no error in the judgment of which appellant can complain, and it is affirmed.

Affirmed.

NOTE BY THE REPORTER.—This decision will strike the reader, we think, as a violation of the maxims, *ex turpi contractu non oritur actio*, and *in pari delicto potior est conditio defendentis*. We have made the following review of the authorities cited in the principal case, and of many others, either in point or apparently analogous :

Finkney v. Reynous and another, 4 Burr. 2069, was the case of a bond to reimburse the plaintiff for moneys paid in compounding for himself and his partner, Richardson, defaulting stock brokers. Lord MANSFIELD emphasized the fact that the offense in question was not *malum per se*, but only prohibited by statute. He says such a bond is not prohibited by the statute, but "is a fair, honest transaction between these two." "If money be lent in order to pay a play debt (supposing the lender not to have been present at the time and place of the play), or in order to pay off an usurious contract, or even to lend out upon usury, and a bond be given for the repayment of the money so lent, such a bond will not be void; the obligor will be bound to pay it." The other judges laid stress on the point that "this is not a bond for the payment of the composition-money to the person Finkney and Richardson had contracted with; but a bond for Richardson's paying to Finkney a debt of honor, and reimbursing to Finkney the money that Finkney

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had paid upon Richardson's account," etc. In this case it does not appear that Richardson was an obligor in the bond. The reporter queries whether he was, stating that he never saw the pleadings.

The circumstances of *Petrie v. Hannay*, 3 T. R. 418, were exactly like those of *Finkney v. Reynous*, except that the action was on an acceptance by the partner himself. *ASHURST, BULLER and GROSE, JJ.*, gave judgment for the plaintiff on the authority of *Finkney v. Reynous*. *KENYON, C. J.*, dissented, holding that that case was distinguished as an action on a bond, the record not disclosing any thing illegal. *BULLER, J.*, said: "In the case of illegal contracts, as they are not bound to pay, one of them cannot acquire a right of action against the other by paying the whole without his consent; in such cases it is necessary to have the consent and direction of that other." *GROSE, J.*, said: "This action is not founded on a promise arising by implication of law out of the illegal transaction, but from an express one made subsequently, and which the defendant was under no necessity of making."

ELDON, C. J., in *Aubert v. Maze*, 2 B. & P. 373, said of *Petrie v. Hannay*, "it proceeds on a distinction the soundness of which I very much doubt." And *EYRE, C. J.*, said of *Petrie v. Hannay* and *Finkney v. Reynous*, in *Mitchell v. Cockburne*, 2 H. Bl. 379. "perhaps it would have been better if they had been decided otherwise." *ABBOTT, C. J.*, also questions those cases in *Cannan v. Bryce*, 3 B. & Ald. 183.

Tenant v. Elliott, 1 B. & P. 3, was assumpsit for money had and received by defendant, an insurance broker, upon an insurance effected by him for the plaintiff, a British subject, on goods from Ostend to the East Indies, in an imperial ship, such insurance being void by statute. This action was sustained, *EYRE, C. J.*, observing: "The defendant is not like a stakeholder. The question is, Whether he who has received money to another's use on an illegal contract can be allowed to retain it, and that not even at the desire of those who paid it to him? I think he cannot." *BULLER, J.*, says: "Is the man who has paid over money to another's use to dispute the legality of the original consideration? Having once waived the illegality the money shall never come back into his hands again. Can the defendant there in conscience then keep the money so paid? For what purpose should he retain it? To whom is he to pay it over; who is entitled to it but the plaintiff?"

Farmer v. Russell, 1 B. & P. 206, asserted the same principle, namely: that if A receive money of B to the use of C, it may be recovered by C in an action for money had and received, though the consideration on which B paid it is illegal; but quere, whether the case would be varied if A were a party to the contract between B and C. *EYRE, C. J.*, said: "In *Tenant v. Elliott* the court were of opinion that though the insurance was clearly void, yet that the broker into whose hands the money was paid had nothing to do with the illegality of the contract. The obligation on him arose out of the fact of the money having been received by him for the use of a third person, which treated a promise in law to pay; and it was well said by my brother *BULLER* that even the man who had paid over money to another's use could not dispute the legality of the original consideration. The case, therefore, is brought to this, that the money is got into the hands of a person who was not a party to the contract, who has no pretense to retain it, and to whom the law could not give it by rescinding the contract. Though the court will not suffer a party to demand a sum of money in order to fulfill an illegal contract, yet there is no reason why the money in this case should not be recovered, notwithstanding the original contract was void."

The two last preceding cases are cited as the basis of the holding in *Brook v. Martin*, relied on in the principal case; but it will be seen that they proceed on an entirely different principle, and seem to recognize the contrary doctrine to that of the principal case. In *Farmer v. Russell*, *ROOKS, J.*, dissented, saying: "I think that a man who has been guilty of an indictable offense ought not to have the assistance of the law to recover the profits of his crime; and that whether his agents be innocent or criminal, privy or not privy, his claim against those agents is equally inadmissible in a court of law." And *EYRE, C. J.*, in concluding, said: "If it be possible to mix the original transaction with the contract on which the action is brought, I agree with my brother *ROOKS* in all his conclusions."

In the earlier case of *Steele v. Lisle*, 6 T. R. 61, A being employed as a broker for B in stock-jobbing transactions, paid the differences for him; a dispute arising between them respecting the amount of A's demand, the matter was referred to C, who awarded \$300 to be due; on which A drew on B for \$100, part of the above, and indorsed the bill to C after B

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had accepted it; *held*, that C could not recover on the bill. KENYON, C. J., distinguished *Petrie v. Hannay*, referred to in the principal case, saying: "If the plaintiff had lent this money to the defendant to pay the differences, and had afterward received the bill in question for that sum, then, according to the principle established in *Petrie v. Hannay*, he might have recovered. But here the bill, on which the action is brought, was given for those very differences, and therefore Wilson himself could not have enforced payment of it." And as the plaintiff knew the consideration was illegal, it was held he could not recover on it."

In *Brown v. Turner*, 2 Esp. 681, Lord KENYON held that no recovery could be had on an acceptance for differences on a stock-jobbing transaction, by an indorsee after maturity. He says, "The bill was not given for money lent to pay defendants, but for the defendants themselves," citing *Steers v. Lashley*. This was confirmed by the King's Bench.

In *Webb v. Brooke*, 3 Taunt. 6, the parties, being prisoners in Portugal, jointly obtained their liberation and the ransom of their ship, contrary to statute, and to effect this the plaintiff lent money to the defendant, and took his acceptance therefor. *Held*, that plaintiff could not recover on the bill. MANSFIELD, C. J., distinguishes *Finkney v. Reynous* and *Petrie v. Hannay*, and asks: "How does this differ from a partnership in a smuggling transaction, where one advances more than his share of the money?" "It would be singular where two are equally interested in wishing and effecting a ransom, if because it happens that one advances the money and takes the bill of the other for repayment, that shall be good, while if the bill were given to the captor only, it would be void."

The case of *Thomson v. Thomson*, 7 Ves. 473, cited in *Brooks v. Martin*, is not a decision in point. The court remark, *obiter*: "If the company had paid this into the hands of a third person for the use of the plaintiff, he might have recovered from that third person, who could not have set up this objection as a reason for not performing his trust. *Tenant v. Elliott* is, I think, an authority for that." "There is nothing collateral in respect to which, the argument being out of the question, a collateral demand arises, as in the case of stock-jobbing differences."

In *Ex parte Mather*, 3 Ves. 373, LOUGHBOROUGH, Chancellor, held that a bill indorsed to a broker in consideration of money paid by him in effecting illegal insurances, could not be proved in bankruptcy. Of *Finkney v. Reynous* and *Petrie v. Hannay*, the chancellor said: "I cannot perfectly accede to them." But the same judge in *Watts v. Brooks*, *id.* 612, held that smuggling transactions or illegal dealings in stock should be brought into an accounting, though the court would not execute the contract. This doctrine, however, was expressly overruled in *Thomson v. Thomson*; *Knowles v. Haughton*, 11 Ves. 168; and by ELDON, Ch., in *Cousins v. Smith*, 13 Ves. 545.

Finkney v. Reynous and *Petrie v. Hannay* were approved by ERSKINE, Chancellor, in *Ex parte Bulwer*, 13 Ves. 318; but of this case, it is said in *Planters' Bank v. Union Bank*, 16 Wall. 500, it goes "farther than can now be sustained."

In *Sharp v. Taylor*, 2 Phillips Ch. 801, so much relied on in the principal case, and in *Brooks v. Martin*, the court said, among other things: "The violation of law suggested was not any fraud upon the revenue, or omission to pay what was due; but at most an invasion of a parliamentary provision, supposed to be beneficial to the ship-owners of this country; an evil, if any, which must remain the same, whether the freight be divided between Sharp and Taylor according to their shares, or remain altogether in the hands of Taylor." "Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that in realizing it some provision in some act of Parliament has been violated or neglected?" This case does not profess to overrule *Knowles v. Haughton* and *Cousins v. Smith*. Indeed, all that is said above seems to be *obiter*, for the court say: "The importation of goods in a ship American built, and not professing to have any English registry, would not be illegal, and the American owner might assign the freight to any one. Assuming this to be so, I am of the opinion," etc. Dr. POLLOCK in speaking of this case, Cont. 304, says: "The right to an account of partnership profits is not lost by the particular transaction in which they were earned, having involved a breach of the law; of course it is not so where the main object of the partnership is unlawful."

In *Armstrong v. Toler*, 11 Wheat. 258, A, during a war, contrived a plan for importing goods on his own account, from the enemy's country, and goods were sent to B by the

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same vessel. A, at the request of B, became surety for the payment of the duties on B's goods, and became responsible for the expenses on a prosecution for the illegal importation of the goods, and was compelled to pay them. *Held*, that A might maintain an action on B's promise to refund the money; but that if the importation is the result of a scheme between the plaintiff and defendant, or if the plaintiff has any interest in the goods, or if they are consigned to him with his privity, in order that he may protect them for the owner, a promise to repay any advance made under such understanding or agreement is utterly void. MARSHALL, C. J., says: "The general proposition stated by Lord MANSFIELD in *Finkney v. Reynous*, that if one person pay the debt of another at his request, an action may be sustained to recover the money, although the original contract was unlawful, goes far in deciding the question now before the court. That the person who paid the money knew it was paid in discharge of a debt not recoverable at law has never been held to alter the case. A subsequent express promise is undoubtedly equivalent to a previous request." The court review the *Finkney* and *Petrie* cases, *Farmer v. Russell*, *Steers v. Lashley*, and *Booth v. Hodgson*, without apparently regarding them as directly in point, but still as authoritative decisions.

In *McBlair v. Gibbs*, 17 How. 232, the action was to recover the proceeds of a share in an association, formed in Baltimore, to furnish military supplies to Mexico, in an attempt to establish her independence of Spain. The claim was allowed and paid by Mexico under the convention of 1839. *Held*, that although the purpose of the company was illegal when instituted and at the time of the assignment of the share, yet the debt being admitted by Mexico, the bona fide assignee could enforce the contract. The court say: "The assignment was subsequent, collateral to, and wholly independent of, the illegal transactions upon which the principal contract was founded." "It may be admitted that even a subsequent collateral contract, if made in aid and in furtherance of the execution of one infected with illegality, partakes of its nature and is equally in violation of law; but that is not this case." "If the party who might set up the illegality chooses to waive it and pay the money, he cannot afterward reclaim it." Citing *Finkney v. Reynous*, *Petrie v. Hannay*, *Tenant v. Elliott*, *Thomson v. Thomson*, *Farmer v. Russell*, *Sharp v. Taylor*.

In *Brooks v. Martin*, 2 Wall. 79, the case was for an account of profits between partners in the purchase and location of soldiers' land warrants. The court said: "When the bill in the present case was filed, all the claims of soldiers thus illegally purchased by the partnership, with money advanced by complainant, had been converted into land warrants, and all the warrants had been sold or located. The original defect in the purchase had in many cases been cured by the assignment of the warrant by the soldier after its issue. A large proportion of the lands so located had also been sold, and the money paid for some of it, and notes and mortgages given for the remainder. There were then in the hands of the defendant lands, money, notes and mortgages, the results of the partnership business, the original capital for which plaintiff had advanced. It is to have an account of these funds, and a division of these funds, that this bill is filed. Does it lie in the mouth of the partner who has by fraudulent means obtained possession and control of all these funds to refuse to do equity to his other partners, because of the wrong originally done or intended to the soldier? It is difficult to perceive how the statute, enacted for the benefit of the soldier, is to be rendered any more effective by leaving all this in the hands of Brooks instead of requiring him to execute justice as between himself and his partner; or what rule of public morals will be weakened by compelling him to do so? The title to the lands is not rendered void by the statute. It interposes no obstacle to the collection of the notes and the mortgages. The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the court in this case." The court mainly rely on *Sharp v. Taylor*, and cite *Tenant v. Elliott*, *Farmer v. Russell*, *Thomson v. Thomson*, and *McBlair v. Gibbs*.

In *Planters' Bank v. Union Bank*, 16 Wall. 500, cited in the principal case, the court say: "We are aware that *Finkney v. Reynous* and *Petrie v. Hannay* have been doubted, if not overruled, in England, but the doctrine they assert has been approved by this court." Citing *Armstrong v. Toler*, 11 Wheat. 258; *McBlair v. Gibbs*, 17 How. 232; *Brooks v. Martin*, 2 Wall. 70.

In *Smith v. Barstow*, 2 Dougl. 155, the action was on a promissory note given under the following circumstances: A bank, organized under an unconstitutional law, drew drafts

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on W. for accommodation, and deposited money with him as security for acceptance. He accepted, but the bank not providing for the payment they were dishonored. In consideration of his surrendering the money, the bank executed the note in suit. *Held*, that a recovery on the note was maintainable. The court said: "This is a new and separate transaction, based upon the fact that the holder of the paper provided for has advanced for it a full consideration, which in justice and equity ought to be paid; and I see nothing to taint it with illegality, although the bills and drafts might originally have been illegal from having been made in the usurpation and illegal exercise of corporate and banking powers."

Compare *Blasdel v. Fowle*, 120 Mass. 447; s. c., 21 Am. Rep. 588; *Holt v. Barton*, 48 Miss. 711; s. c., 2 Am. Rep. 640; *Peed v. McKee*, 42 Iowa, 680; s. c., 30 Am. Rep. 681; *Bibb v. Hitchcock*, 49 Ala. 408; s. c., 20 Am. Rep. 288; *Buck v. First Nat. Bk.*, 27 Mich. 208; s. c., 15 Am. Rep. 189; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Penn. St. 173; s. c., 8 Am. Rep. 159.

The last case is in point and seems to us opposed to the doctrine of the principal case. The court say: "A second question is, whether the bill drawn in this case by the general sales agent on the Barclay Coal Company, in favor of the Morris Coal Company, to equalize prizes upon a settlement under the contract, is such an independent cause of action as will support the suit. When a bill, note, or bond is but an instrument to execute an illegal contract, it is tainted by the illegality, and cannot be recovered. The illegal consideration enters directly into the instrument, and is followed up because the law will not permit itself to be violated by mere indirection." Citing *Steers v. Lashley*, 6 T. R. 61; *Swan v. Scott*, 11 S. & R. 164; *Stanton v. Allen*, 5 Den. 434; *Fisher v. Bridges*, 3 E. & B. 642. Distinguishing *Finkney v. Reynous*, *Petrie v. Hannay*, *Farmer v. Russell*, *Lestaples v. Ingraham*, 5 Penn. St. 82; *Thomas v. Brady*, 10 id. 164, as cases founded on a new consideration, and not in execution of the illegal contract. "The present case is free of difficulty, the money represented by the bill arising directly upon the contract, to be paid by one party to another party to the contract, in execution of its terms."

In *Stanton v. Allen*, 5 Den. 434, the action was on a note given for canal tolls under an illegal agreement, between an association of proprietors of canal boats, to regulate the price of freight and passage and divide profits, and prohibiting the members from engaging in similar business outside the association. The note purported on its face to be for such tolls. *Held*, that no action could be maintained on it. The point decided in the principal case was not particularly considered.

In *Gray v. Hook*, 4 Comst. 459, it is said: "The distinction between a void and valid new contract, in relation to the subject-matter of a former illegal one, depends upon the fact whether the new contract seeks to carry out or enforce any of the unexecuted provisions of the former contract; or whether it is based upon a moral obligation growing out of the execution of an agreement which could not be enforced by law, and upon the performance of which the law will raise no implied promise. In the first class of cases no change in the form of the contract will avoid the illegality of the first consideration; while express promises based upon the last class of consideration may be sustained." Here two applicants for the same office agreed that one should withdraw his application, and aid the other, who if appointed should share the fees with him. The agreement was carried on so far that the appointee executed to the other his note for his share of the fees; but a litigation concerning the office and its fees having arisen, he refused to pay it until the other should have executed to him his covenant to pay one-half of any liabilities by reason thereof. The covenant was accordingly executed, and the note was paid. The suit was upon the covenant, and it was *held* that it could not be maintained.

In *Swan v. Scott*, 11 S. & R. 165, the suit was on a bond given in satisfaction of an award founded on an illegal lottery transaction, and it was *held* maintainable, on the authority of *Finkney v. Reynous*. The court say, however: "The plaintiff may recover, unless it be directly on the forbidden contract; a bond, the consideration of which grows out of an illegal transaction; then the illegal consideration is the sole basis of the bond, and there can be no recovery; but if a judgment has been rendered on that bond and another bond has been given in satisfaction of it, there the judgment, which must be legal, is the consideration, and obligor is precluded from entering into the illegality of the original transaction."

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A very authoritative decision, flatly opposed to that in the principal case, is *Woodworth v. Burnett*, 43 N. Y. 273; s. c., 3 Am. Rep. 706. The court recognize and distinguish *Tenant v. Elliott*, and doubt and distinguish *Finkney v. Reynous* and *Petrie v. Hannay*. The court say: "The sentiment 'honor among thieves' cannot be enforced in courts of justice." "It is sought to consummate the illegal contract by a new agreement that it shall be performed. No case has gone this length."

In *Lestapies v. Ingraham*, 5 Penn. St. 81, the cases of *Finkney v. Reynous*, *Petrie v. Hannay* and *Ex parte Bulwer* were approved, but it seems only *arguendo* on the supposition that the original transaction was corrupt.

In *Thomas v. Brady*, 10 Penn. St. 164, the action was upon a contract of indemnity by C to A for the delivery to C in payment of a debt due C from B, of goods which A had received from B in fraud of B's creditors. *Held*, maintainable.

The authorities are very elaborately considered in *Gilliam v. Brown*, 43 Miss. 641, where it is *held* that after an illegal contract has been executed, one party, in possession of all the gains and profits thereof, is liable to account to the other therefor, and cannot interpose the objection that the business which produced the fund was in violation of law. In *McWilliams v. Phillips*, 51 Miss. 196, it is, however, *held* that in case of an executed contract, where all the parties participated in the violation of the law, the court will not relieve either.

In *Owen v. Davis*, 1 Bailey, 315, the plaintiff was the joint owner of a note given for money lost at cards, and which had been paid to defendant. The plaintiff was allowed to recover one-half of the money. "One who receives money to the use of another on an illegal contract cannot retain it to his own use, on the ground of the illegality of the contract." "The money received might indeed well be termed the wages of iniquity; but why should one of the co-workers be permitted to add a fresh iniquity, by retaining the whole, contrary to his agreement?" This is founded on *Tenant v. Elliott* and *Farmer v. Russell*.

Story says, Cont., § 760: "If an act in violation of either statute or common law be already committed, and a subsequent agreement entered into, which, though founded thereupon, constituted no part of the original inducement or consideration of the illegal act, such an agreement is valid." But, "wherever the original illegal contract is so involved in the contract on which the action is brought, that the two cannot be separated—and wherever they seem to be a continuation of the same agreement—no action can be supported on either. But if the subsequent agreement be totally disconnected from the original, it may be enforced."

The same writer says, Eq. Juris., § 298: "The suppression of illegal contracts is far more likely, in general, to be accomplished by leaving the parties without remedy against each other, and by thus introducing a preventive check, naturally connected with a want of confidence, and a sole reliance upon personal honor. And so accordingly the modern doctrine is established." And at § 61: "In case of illegal contracts, or those in which one party has placed property in the hands of another for illegal purposes, as for smuggling, if the latter refuses to account for the proceeds, and fraudulently or unjustly withholds them, the former must abide by his loss." In a note to this section, the writer says: "Conveyances in fraud of creditors seem by some cases to be enforceable between the parties in equity and at law." Citing *Brooks v. Martin*, 2 Wall. 70; *Harvey v. Varney*, 98 Mass. 116; *Springer v. Drosch*, 22 Ind. 486; s. c., 2 Am. Rep. 356; *Clemens v. Clemens*, 28 Wis. 637. To which may be added *Andrews v. Marshall*, 43 Me. 273; *Hoeser v. Kracker*, 29 Tex. 450; *Lawton v. Gordon*, 34 Cal. 86; *Davis v. Ransom*, 26 Ill. 106. But *contra*: *Nellis v. Clark*, 20 Wend. 24; s. c., 4 Hill 424; *Moseley v. Moseley*, 15 N. Y. 335; *Sweet v. Tinslar*, 32 Barb. 371; *Murphy v. Hubert*, 16 Penn. St. 50; *Eyre v. Eyre*, 19 N. J. Eq. 42; *Stephens v. Heirs of Harrow*, 26 Iowa, 458.

From the foregoing examination we are inclined to conclude: *first*, that the cases of *Finkney v. Reynous* and *Petrie v. Hannay* are of very doubtful authority, if not practically overruled in England; *second*, that the cases of *Farmer v. Russell* and *Tenant v. Elliott* are not at all in point; *third*, that the case of *Brooks v. Martin* is an authority for the doctrine of the principal case, but is not supported by the authorities it cites, either in this country or in England; *fourth*, that in the State courts the weight of authority is against that doctrine; *fifth*, that on principle, that doctrine is open to criticism as illogical and impolitic. On this latter point it should be remembered that while it may seem immoral to allow one

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of two parties to an executed illegal contract to deny to the other his share of the spoil, yet the true doctrine of the law is that it "will not lend its aid to such a plaintiff," as Lord Mansfield said in *Holman v. Johnson*, Cowp. 343. In the principal case it seems to us impossible to justify such interference on the ground of a new promise, which is only an expression of what the law implies from the transaction, and rests upon no new and independent valid consideration. The illegal bargain between the parties contemplated the division of the profits, and the note sued on was only a promise to pay what the bargain implied, and was in direct fulfillment of the contract. The cases sustaining a note given in place of one tainted with usury, rest on a different principle, for the act of lending money is lawful, and will support a promise for repayment divested of usury; but the note in the principal case arose out of a transaction unlawful and forbidden.

CRUTCHFIELD V. DONATHON.

(49 Tex. 691.)

Statute of frauds — signing of memorandum — note for lands.

Defendant executed to plaintiff a negotiable instrument, which stated that the consideration was land sold him by plaintiff. In a suit upon that instrument, *held*, (1) that the suit was on the note and not on the contract of sale of the land; (2) that as a memorandum of the sale it did not need to be signed by the vendor;* (3) that it was enforceable as a note, although it might not be a sufficient memorandum under the statute of frauds.

ACTION on a written instrument. The opinion states the facts. Judgment below for plaintiff.

Charles Soward, for appellant, cited *Farmer v. Simpson*, 6 Tex. 307; *Brock v. Jones*, 8 id. 78; *Dawson v. Miller*, 20 id. 171; *Harris v. Crittenden*, 25 id. 325; *Davenport v. Chilton*, id. 518; *Paschal's Dig.* 3875.

Ball & Roach, for appellee.

GOULD, A. J. J. W. Donathon sued L. L. Crutchfield on his promissory note, as follows:

"JACKSBORO, May 3, 1873.

"Thirty days after date I promise to pay J. W. Donathon, or bearer, two hundred and fifty dollars, with five per cent interest per month from date until paid, for value received. The consideration of the above note is one-half of a certain town lot in the town of Jacksboro, in lot number four (4) in block number three (3).

(Signed)

"L. L. CRUTCHFIELD."

**Contra*: *Corbitt v. Salem Gas-light Co.* (6 Oregon, 405), 25 Am. Rep. 541, and note, 543.

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In the petition, as amended, it is alleged that this note was given for the purchase-money of the east half of the lot named; that plaintiff is ready and willing to make to Crutchfield a good warranty deed, upon payment of the note sued on, tendering the deed into court, praying for judgment on the note and the enforcement of the vendor's lien.

The only part of defendant Crutchfield's answer that need be stated is as follows: "The pretended sale of the east half of lot number 4 in block number 3, in the town of Jacksboro, if ever made by plaintiff to this defendant, the same was not evidenced by any deed in writing, or any memorandum in writing, signed by either the plaintiff or defendant herein, or any other person by them or either of them thereunto lawfully authorized, so as to bind either of the parties thereunto; and of this defendant puts himself upon the country." To this plea there was no exception.

On the trial, the plaintiff was allowed to testify, over the objection of defendant, that it was for the east half of the lot that the note was given. He further testified that the trade was made some time before the note was given, and that he had at all times been ready to make defendant a deed upon payment of the note, bringing a deed into court. The defendant asked a charge to the effect, that unless the sale was evidenced by a written memorandum signed by Donathon, they would find for defendant. The court refused to give this charge, and in the charge as given excluded from the consideration of the jury the defense set up under the statute of frauds.

There was judgment for plaintiff for the amount of the note and interest, and for the enforcement of the vendor's lien on the lot, from which judgment Crutchfield appeals.

The question presented is as to the effect of the statute of frauds on the plaintiff's right to recover, and may be subdivided into two questions:

1. Was the action brought upon a contract for the sale of lands, signed and evidenced as required by the statute?

2. Was it shown that the instrument sued on was without consideration?

So much of the "act to prevent frauds and fraudulent conveyances" as is material to this case is: "No action shall be brought whereby to charge any executor or administrator upon any special promise to answer any debt or damage out of his own estate, or whereby to charge the defendant upon any special promise to an-

swer for the debt, default, or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract for the sale of lands, slaves, tenements or hereditaments, or the making of any lease thereof for a longer term than one year, or upon any agreement which is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith, or some person by him thereunto lawfully authorized." Paschal's Dig., art. 3875. This section, with some little change, is copied from the fourth section of the statute of frauds of 29 Charles II., A. D. 1677, and as that famous English statute had been fully construed by the courts of England and the United States, its phraseology was doubtless adopted by the Congress of the Republic with the wise design of accepting that construction. Unless on points where a change of construction is indicated by some change of phraseology, the fundamental rules of our law, framed to promote that stability and certainty in the law which are so desirable, require that the courts should give to this statute that construction which accords with the great current of English and American authority.

There can be no question, that according to the current of authority the agreement or memorandum thereof required by the statute "need not be signed by both the parties, but only by him who is to be charged by it." 3 Pars. on Cont. (5th ed.) 9; Brown on Frauds, § 365; Benj. on Sales, ch. 7, p. 188; *Egerton v. Mathews*, 6 East, 307; *Laythorp v. Bryant*, 2 Bing. N. C. 735; *Allen v. Bennett*, 3 Taunt. 169; *Clason v. Bailey*, 14 Johns. 484; *Justice v. Lang*, 42 N. Y. 493; s. c., 1 Am. Rep. 576; *Fenly v. Stewart*, 5 Sandf. 101; *Penniman v. Hartshorn*, 13 Mass. 87; *Barstow v. Gray*, 3 Greenl. 409; *Douglas v. Shears*, 2 N. & M. 207; 10 Am. Dec. 588; *Shirley v. Shirley*, 7 Blackf. 452; *Brumfield v. Carson*, 33 Ind. 94; *Morin v. Martz*, 13 Minn. 191; *Thornton v. Kempster*, 5 Taunt. 786;

Addison, in his work on Contracts, says: "If an agreement has been made by word of mouth for the purchase and sale of an estate, and the purchaser signs a memorandum by which he agrees to buy the property for a certain sum from the vendor, and the vendor is ready to establish his title, and is willing and offers to convey the property to the purchaser, the latter cannot escape from his agreement to buy, by saying that the vendor has signed no

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memorandum of the contract, and was not himself liable upon it by reason of the statute." Vol. 1, § 213, citing, in addition to some of the cases already cited, *Holton v. Gray*, 2 Ch. Cas. 164; *Fowle v. Freeman*, 9 Ves. 351; *Seton v. Slade*, 7 id. 265.

The objections to this construction of the statute, as stated by Lord REDESDALE in *Lawrencson v. Butler*, 1 Sch. & Lef. 13, are certainly forcible, and have led some courts, and at least one recent author, to reject it as unreasonable, notwithstanding the length of time it has been established by authority. Bing. on Sales of Real Prop. 434 *et seq.*; *Thomas' Executrix v. Trustees of Harrodsburg*, 3 Marsh. 1147; *Fraser v. Ford*, 2 Head, 464. But seventy years have passed since Chancellor KENT said that the "weight of argument was in favor of the construction that the agreement concerning lands to be enforced in equity should be mutually binding;" but added, "It appears from the review of the cases that the point is too well settled to be now questioned." *Clason v. Bailey*, 14 Johns. 489. Surely this might be repeated now with increased force and emphasis.

According to authority, if the instrument sued on were otherwise such a memorandum as the statute required, Donathon was entitled to sue upon it, although he himself had not signed it.

Where the action is brought by the vendor upon the contract of sale, and the contract is verbal and executory on both sides, it cannot be maintained, although the vendor tender a deed. *Brock v. Jones*, 8 Tex. 78; Brown on Frauds, § 115.

But where the action, as in this case, is brought upon a promissory note given by the vendee, although it may not be such a memorandum as satisfies the statute, the maker "cannot avoid the note which he has given because he has omitted to bind the vendor." *Rhodes v. Storr*, 7 Ala. 347; *McGowen v. West*, 7 Mo. 569; Brown on Frauds, § 122b.

The cause of action in this case is a promissory note reciting its consideration; and as the action is brought upon the note, and not upon the contract of sale, it is no valid defense to plead that the sale of the lot in consideration for which the note was given was not evidenced by any writing, as required by the statute. *Gillespie v. Battle*, 15 Ala. 276.

"The statute of frauds," says Justice CHILTON, "does not render a contract absolutely void, but voidable merely. It was enacted for the benefit of defendants." Parsons, in his work on Contracts,

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says: "We consider them neither void nor voidable. If they were good at common law, they remain good now for all purposes but that expressly negatived by the statute; that is, no action can be brought upon them, but in other respects they are valid contracts." 3 Pars. on Cont. (5th ed.) 57. Be this as it may, it is evident that to a suit on a note it is no defense to plead that the sale was not evidenced as required by the statute of frauds. Says Justice CHILTON: "The statute, when set up as a defense to an action upon the note, affects the consideration only, and not the contract otherwise." 7 Mo., *supra*; *City of Edelin v. Clarkson*, 3 B. Monr. 31. But how can it be said that the consideration has failed by reason of the statute of frauds, where, as in this case, the vendor tenders a deed? *Id.* 283; *Browne on Frauds*, § 122*a*. If, as claimed by appellees in their brief, but which does not otherwise appear in the record, Crutchfield received and held possession of the lot, it would be still more evident that the consideration had not failed. *Browne on Frauds*, §§ 471, 121.

Our conclusion is, that this action was not brought upon a contract for the sale of lands, but upon a promissory note given for the purchase-money of land; that it was not shown by the evidence that the consideration of the note had failed; and that the plaintiff was entitled to his judgment on his note, and a foreclosure of the lien evidenced by the note.

The parol evidence admitted did not vary or contradict the recitals of the note, and was clearly admissible. The objection was based on the idea that the note was a memorandum of a contract of sale of land under the statute.

The judgment is affirmed.

Judgment affirmed.

HOUSTON, ETC., RY. CO. v. ADAMS.

(49 TEX. 748.)

Carrier — delivery of goods to wrong person.

Plaintiff, at Columbus, Georgia, delivered his household goods, marked "R. Adams," to defendant, a common carrier, for carriage. He accompanied them as far as New Orleans. There he directed defendant's agent to forward them to Bremond, Texas. By mistake the agent shipped them to

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Brenham. There, on the authority of a letter written from Burton, signed "R. Adams," they were forwarded to Burton, and there delivered to a man calling himself Robert Adams, a single man and day laborer, who had no bill of lading or receipt for them, and was not the plaintiff. *Held*, that the defendant was liable for the goods as a common carrier.* *It seems*, the defendant would be liable therefor as a warehouseman, for gross negligence. The statute of limitations will not bar an action for conversion, in the absence of knowledge by the owner of such conversion, until a reasonable time elapses for learning the facts.

ACTION for conversion. The opinion states the facts. The plaintiff had judgment below.

Sayles & Bassett, for plaintiff in error. The liability of the plaintiff in error, under the facts of this case, was changed from that of a common carrier to that of a warehouseman, and no such acts of negligence were shown as to render the defendant responsible for the loss of the goods. *Garside v. Trent and Mersey Navigation*, 4 T. R. 581; *Hyde v. Trent and Mersey Navigation*, 5 id., 389; *McHenry v. Philadelphia, Wilmington and Baltimore Railroad*, 4 Harr. 448; *Thomas v. Boston and Providence Railroad Company*, 10 Metc. 472; *Norway Plains Company v. Boston and Maine Railroad*, 1 Gray, 263. Notice to the consignee is excused when he cannot be found. *Fisk v. Newton*, 1 Den. 45; *Ostrander v. Brown*, 15 Johns. 39.

The delivery of the property of one person to another of a different name, although by mistake, is evidence of the want of common and reasonable care; but the delivery of property marked with a particular name, to a person to whom that name belongs, is not such evidence.

In *Sewell v. Evans* and *Roden v. Ryde*, 4 Ad. & El. (N. S.) 626, it is held that the evidence of identity from the similarity of names, in an action at law, was *prima facie* sufficient. In *Chambles v. Tarbox*, 27 Tex. 139, it is said, by Mr. Justice MOORE, that mere "similarity of name" affords evidence of identity. In that case the similarity of the given name of a married woman, with other circumstances, was sufficient evidence to establish a chain of title. If, then, identity of name is *prima facie* evidence of identity of person, can the delivery to the person thus identified, especially when there were other circumstances, as the frequent inquiry

*To the same effect, *Price v. Onondaga & Syracuse Ry. Co.* (50 N. Y. 213), 10 Am. Rep. 475. *Contra: Dunbar v. Boston and Providence R. R. Co.* (110 Mass. 25), 14 Am. Rep. 575.

about the goods, possession of a printed bill of lading therefor, etc., to support the conclusion, be said to be negligence? * * *

Shepherd & Garrett, for defendant in error.

MOORE, A. J. By the contract upon which this action was brought, the plaintiff in error undertook and bound itself, as a common carrier, to safely carry from the city of Houston, in Harris county, and deliver at its depot, in the town of Brenham, the goods for the value of which the defendant in error brought this suit.

It appears from the receipt given by the forwarding agent of plaintiff in error at Galveston, January 12, 1871, that the bales and box containing the goods, to recover the value of which this action is brought, were marked "R. Adams, Brenham, Texas"; but we cannot infer from the record that the identity or ownership of them by defendant in error was otherwise disclosed, or that the place of residence of the consignee was known to plaintiff in error, or its agents who forwarded or received the goods, either at Brenham or Burton, where they were lost.

The statement of facts shows that on the 19th of January, 1871, the goods arrived at Brenham, and were placed in plaintiff's depot at that place; but on a letter from some one signing himself "R. Adams," requesting it, they were, on the 23d of the same month, forwarded to Burton, where they remained in plaintiff's depot until the 16th of March, 1871, when they were delivered to Robert Adams, who receipted for them by writing his name R. Adams in plaintiff's freight book, opposite the entry therein of said articles. The Robert Adams to whom the goods were delivered is shown to have been about Burton for a month or two previous to the delivery of the goods to him, or it may be for that time prior to their arrival at Burton; and he remained there for several months subsequently. He seems to have been an ordinary laborer. His occupation during a part of the time was that of digging a well for one of defendant's agents or clerks at that place. It is shown that he had frequently inquired for the goods previous to their arrival, stating that they had been shipped to Brenham, but that he had requested defendant's agent at that place to forward them to Burton.

Subsequently to the delivery of the goods to Robert Adams, at Burton, and probably a month or two after he had left there, the defendant in error, discovering that they had been forwarded, as we may infer, by mistake of the forwarding agent of

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the Morgan line of steamers at Galveston (and who must be regarded as also defendant's agent) to Brenham, instead of Bremond, demanded them of plaintiff in error at Brenham, and also at Burton, having previously made repeated applications for them at Bremond. Failing, however, to receive the goods at either place, on the 6th of February, 1873, he instituted this suit.

Admitting that the mistake in freighting the goods to Brenham, instead of Bremond, cannot be imputed to defendant, still it cannot be denied that defendant was bound as a common carrier to deliver the goods in Brenham to the real consignee to whom they in fact belonged, and that the delivery of them to any one else was a violation of the contract, which entitled the owner to an action for their value. The case of *Winslow v. The Vermont and Massachusetts Railroad Company*, 42 Vt. 700 ; s. c., 1 Am. Rep. 365, is strictly in point, and fully sustains this proposition.

It is there said : "It has been urged, that the defendants cannot, even as carriers, be held liable for delivering the goods to the wrong party, if they deliver them in the customary manner and in the usual course of business. We think no such exception to the common-law rule can be made. The carrier is under the same contract, obligation, or duty to deliver the goods safely that he is to carry them safely. The law fixes these duties upon the carrier, and he cannot relieve himself from them by proving his usage. It is true, as urged, that it is not as customary for other carriers, as it is for express companies, to oblige themselves to look up the owner and consignee, and deliver the goods to him at his residence or place of business. But all classes of common carriers are responsible, and equally responsible, for a loss of the goods by delivery to the wrong person." And says the court in *McEntee v. The New Jersey Steamboat Company*, 45 N. Y. 34; s. c., 6 Am. Rep. 28: "Common carriers deliver property at their peril, and must take care that it is delivered to the right person; for if the delivery be to the wrong person, either by an innocent mistake or through fraud of third persons, as upon a forged order, they will be responsible, and the wrongful delivery will be treated as a conversion." Numerous other cases to the like effect might be easily cited, but it is unnecessary. The proposition is too elementary to require it. Story on Bail., §§ 540, 543, 545b.

It certainly follows, if the carrier is guilty of a conversion of the goods by delivering them to the wrong person, though he has acted

in good faith and with due caution, he is equally so when he forwards them from their point of destination elsewhere on the order of any one but the party to whom they should have been delivered. *Stephenson v. Hart*, 13 E. C. L. 596. The consignee is entitled to receive his goods at the place where the carrier undertook and bound himself to deliver them, and is under no obligation to seek or demand them elsewhere. Nor can he be held bound by, or be supposed to have consented to, their improper shipment or delivery by the carrier, merely by following them to the point to which they have been improperly forwarded, or by demanding them from the party to whom they were wrongfully delivered.

But plaintiff in error maintains that its liability to defendant in error as common carrier, in respect to these goods, had ceased even before they were forwarded to Burton; and if not, it certainly had before they were delivered at Burton to Robert Adams. In order to determine whether plaintiff in error incurred any liability to the owner by forwarding the goods to Burton and delivering them after their arrival there to said Robert Adams, it is maintained that recourse must be had to the law applicable to warehousemen, and not to that to which carriers are held subject. But let us see if it is true that defendant's liability as carrier for the delivery of these goods had ended before they were delivered to the pretended owner at Burton, or would when they were forwarded from Brenham.

When the course of business of the carrier is such as will not ordinarily admit of a personal delivery of the goods to the consignee, there seems to be some conflict in the adjudged cases as to the precise time and circumstances when the liability of the carrier as such ceases and that of warehouseman begins; but whatever difficulty may be found in determining this point at common law or in reconciling the different decisions regarding it, is eliminated in this State by statute, by which it is clearly and definitely determined.

[Omitting the statutory consideration.]

But if defendant's liability was merely that of warehouseman, would the facts shown in the record have justified the forwarding of the goods from Brenham, or the subsequent delivery of them to a party in whom the evidence fails to show any thing more than a mere pretense of right to them? While a warehouseman may no doubt be fully justified in many instances in delivering freight to well-known and responsible business men residing in the

immediate vicinity of the place to which goods are sent, we think there can be no hesitancy in saying that it was gross negligence to deliver goods of the description and value of these to a man without family, or settled place of residence, or permanent occupation; who held no receipt or bill of lading for them; and this, too, in the absence of facts or circumstances of any kind tending to show that he either owned or had any connection with them, except his statement, before the arrival of this particular freight, that a lot of freight belonging to him had been shipped to Brenham, and that he had ordered it forwarded to Burton, and the bare fact of the similarity of his surname and the initial letter of his Christian name with that of the consignee; and certainly nothing whatever is shown to have warranted defendant in forwarding the goods from Burton. It does not appear that defendant's agent knew, or had even ever heard, prior to the receipt of his letter, that such a person as "R. Adams" was residing there, or could rightfully lay any claim to these goods.

The only remaining question is — was the action barred by limitation when the suit was brought? There is no pretense that it was, unless defendant was guilty of a conversion of the goods when they were forwarded to Burton on the order of R. Adams; but if so, certainly the statute would not begin to run against plaintiff until he had notice of their conversion, or the lapse of time had been sufficient to charge him with notice of it. It is not pretended that plaintiff is chargeable with actual knowledge of the conversion in time to complete the bar before the commencement of his suit; and certainly we cannot say that the mere lapse of time from the 23d of January to the 6th of February is sufficient to raise a presumption that he must have known of the conversion of the goods, which we must do before we can reverse the judgment on this ground. When actual knowledge of the conversion is not shown, the statute cannot commence to run against the consignee before it was his duty to apply for the delivery of the goods. The time within which the owner is bound to apply for or demand them evidently depends upon the terms of the contract under which they were freighted, the usual length of time required to transport freight from the place of delivery to its point of destination, the reasonable course of business at the place of its delivery, and other attending circumstances. These facts and circumstances, however, were not developed or exhibited upon the trial, as they should

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have been, by defendant, upon whom the affirmative of this issue rested. Whatever, therefore, may be the real facts, the evidence before them would not have warranted the jury in finding the action barred.

There is no error in the judgment, and it is therefore

Affirmed.

LACOSTE V. DUFFY.

(49 Tex. 767.)

Mandamus—for office—suit for, not triable after term of office has expired.

A suit for mandamus for an office will not be determined after the term of the office has expired.

SUIT for mandamus. The opinion states the facts.

J. P. Simpson, for appellant.

Waelder & Upson, for appellee.

ROBERTS, C. J. This is a suit for mandamus, instituted in the District Court on the 24th of January, 1874, there tried, and the appeal therefrom filed in this court on the 8th of June, 1874. The object of the suit was to have determined whether James Duffy, having been elected county treasurer in November, 1872, held the office two years from that time, or only one year, and until J. B. Lacoste was elected to the same office at the general election held on the 2d of December, 1873, the term of said office, as prescribed by law, being two years, and the office having been created and made elective by statute.

From some cause not now known, the case was not determined at the term of this court to which it was returned, although good briefs were filed on both sides. It would then have involved a practical question; and it is to be regretted that it was not then decided. It was not reached in its order of filing on the docket until the last term of the court, when it was referred back to counsel, to learn from them whether or not it was considered important to the parties to have the question of law investigated and decided by the court; and there being nothing further proposed by counsel, it is presumed that the case now is regarded as involving nothing

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more than the cost, as the term of office has long since expired; and if the judgment should be reversed, there could be no judgment rendered now to put J. B. Lacoste into the office, and that is ordinarily a good reason for not rendering a judgment. High on Ex. Rem., § 14; *Bassett v. School Directors*, 9 La. Ann. 513.

This is especially the case in mandamus and information in the nature of a *quo warranto* for an office the term of which has expired. High on Ex. Rem., § 633; *Morris v. Underwood*, 19 Ga. 559; *People v. Sweeting*, 2 Johns. 184; *People v. Hartwell*, 12 Mich. 508. Supreme Courts have sometimes decided such a question merely with reference to the cost. *Sheets v. Baldwin*, 12 Ohio, 180.

It has not been customary in this court to decide questions of importance after their decision has become useless, merely to ascertain who is liable for the cost. The amount of business of practical importance would forbid that the time of the court should be so occupied.

As the condition of the case is now such that the court could not render an effective judgment upon its reversal, the case is dismissed. See *Gordon v. The State*, 47 Tex. 208.

Dismissed.

CASES
IN THE
COURT OF APPEALS
OF
TEXAS.

WARRINER V. STATE.

(3 Tex. Ct. App. 104.)

Criminal Law — twice in jeopardy.

On a trial for aggravated assault the defendant pleaded a former conviction before a justice of the peace. It appeared that the justice acted without affidavit or warrant, that no witnesses were examined, and that defendant pleaded guilty of simple assault. *Held* no bar.

CONVICTION of aggravated assault. The opinion states the case.

No brief for appellant.

George McCormick, assistant attorney-general, for the State.

WINKLER, J. The appellant was indicted for an assault with intent to murder one B. A. Atwood. On the trial the counsel representing the State declined to prosecute for any higher grade of offense than an aggravated assault, and the judge, in his charge, withdrew from the jury the consideration of the charge for intent to murder, and confined the jury to the consideration of the case as for aggravated assault and simple assault and assault and battery.

The defendant, besides the plea of not guilty, pleaded a former conviction for the same offense, which was submitted to the con-

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consideration of the jury, in connection with the plea of not guilty, under the instructions from the judge.

In support of the plea of former conviction the defendant read in evidence a certified copy of the judgment of the justice of the peace, which shows that at a special term of the justice's court the following entry was made: "Now on this day comes J. G. Warriner, defendant in the above case, and pleads guilty to a simple assault and battery on the body of B. A. Atwood, on the 31st day of January, A. D. 1876, and waives a jury and demands a trial; whereupon, after hearing a statement, it is the order and decree of the court that the State of Texas do have and recover as a fine the sum of two and fifty one-hundredths dollars, and all costs of suit; for which execution may issue." Dated and signed by the justice of the peace.

It was shown on the trial in the District Court that no affidavit had been filed or warrant of arrest issued, or any evidence heard before the justice of the peace, except as shown by the judgment above set out.

The justice of the peace, in the absence of an affidavit and warrant, and of an examination of the case, could not oust the District Court of its jurisdiction to try the accused for an offense of higher grade than that to which the defendant had pleaded guilty; nor could the defendant, by waiving an examination into the circumstances under which the assault and battery was committed, screen himself by submitting to a nominal fine, and avoid the legitimate consequences of his acts according to the degree of aggravation or mitigation shown by the evidence. *Norton v. The State*, 14 Tex. 387; *Wilson v. The State*, 6 id, 247.

The following quotation from Bishop's Criminal Law is applicable to the case under consideration:

"But sometimes a man, conscious of guilt, procures a proceeding against himself, and suffers a slight punishment, thinking thereby to bar a prosecution carried on in good faith. In such a case, if the first prosecution is really managed by himself, either directly or through the agency of another, he is, while thus holding his fate in his own hand, in no jeopardy; the plaintiff State is no party in fact, but only such in name; the judge is imposed on, indeed, yet in point of law he adjudicates nothing. 'All is a mere puppet-show, and every wire moved by the defendant himself.' The judgment, therefore, is a nullity, and is no bar to

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a real prosecution." This authority is supported by a number of decisions. 1 Bishop's Cr. Law, § 852.

There being no error in the judgment, it is affirmed.

Affirmed.

HUNT V. STATE.

(8 Tex. Ct. App. 116.)

Criminal law — disturbing religious worship.

Cracking and eating nuts during a religious service may be a disturbance of religious worship.

CONVICTION of disturbance of religious worship. Witnesses testified that the defendants' conduct disturbed them in the meeting. The opinion states the other facts.

T. D. Montrose, for appellants, cited Pasc. Dig., art. 1904, 3064; also, 1 Bish. Cr. Law, § 345.

George McCormick, assistant attorney-general, for the State.

WHITE, J. The five appellants in this case were tried upon information in the County Court of Hunt county, for disturbance of religious worship. The disturbance consisted in cracking, picking out and eating pecans in the church during the services. The jury found them guilty and fined them each \$25, and judgment was so rendered. There is nothing in the record of which they have any just ground of complaint. Under the proof we think the jury found rightly, and that the judgment is, in every respect, correct. It is, therefore, in all things affirmed.

Affirmed.

SPEIDEN V. STATE.

(8 Tex. Ct. App. 156.)

Criminal law — burglary — decoying into commission of.

A banker, suspecting defendant of an intention of robbing his bank, employed detectives to act as decoys and induce him to enter the bank, with intent to rob it. *Held*, that the defendant could not be convicted of burglary therefor, the consent of the detectives being the consent of their employer. (*See note, p. 129.*)

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CONVICTION of burglary. The opinion states the facts.

Thurmond, Willard & Fletcher, for appellant.

George McCormick, assistant attorney-general, for the State.

WHITE, J. [Omitting minor questions.] 3. The last, and, in our estimation, the most important proposition to be considered is whether or not the evidence is sufficient to warrant the verdict and judgment when applied to the law applicable to the case. As disclosed in the record, the facts are substantially as follows:

Pinkerton's detective agency, at Chicago, Illinois, obtained by some means a number of letters and postal cards written by the defendant from Dallas to a friend in Chicago, urging him to come to Dallas and join him in breaking into and robbing some of the banks in the latter city. It appears that Pinkerton forwarded those letters to John Kerr, a banker of Dallas, who immediately called a meeting of the bankers of the city, and submitted the matter to them. The result of this meeting was that the bankers requested Pinkerton to send a detective to Dallas to work up the case. Deroso, a sergeant of Pinkerton's force, came, and, after an interview with the bankers, sent back to Chicago for Wood and McGuire, two detective aids, who were to represent themselves to the defendant as professional burglars, and induce him to enter some bank building in the night-time, when they would procure his arrest.

After the arrival of Wood and McGuire, they set to work to carry out this plan, keeping in constant communication with Deroso, and through him with the bankers, who were kept constantly informed as to the plans and movements of the parties. Finally it was agreed on all hands that the banking-house of Adams & Leonard should be broken into on Sunday night. Adams & Leonard agreed to the arrangement, and the detectives were in the adventure, working in their employ.

Pursuant to the plan agreed upon, Deroso, Hereford, a deputy sheriff of Dallas county, a Mr. Mixon, United States deputy marshal, and another party, entered and took possession of the bank during the day-time, about two or three o'clock on Sunday, to remain therein until the burglary was effected and the defendant was arrested. About one o'clock at night the back door of the bank was forced open by the two detectives, Wood and McGuire, who came in, spoke to the concealed parties, and went into the vault; when,

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quent consent of the merchants and co-operation of the detective in the entry of the store, unless the merchants or the detective suggested the offense or originated the criminal intent or agreement. Distinguishing the principal case.

In *Sanders v. State*, the Supreme Court of Tennessee very recently passed on a similar question.—The prosecutor was informed that the defendants were coming to his smoke-house on a specified night to steal his meat, and he and others concealed themselves near by to watch; the smoke-house door was opened, and the house entered, when immediately the parties on watch closed in and arrested one of the defendants in the smoke-house, and afterward the other. It was claimed that what was done was by the consent of the prosecutor, in pursuance of a plot arranged between him and one Ellison. *Held*, that a charge that if the breaking of the house, or the removal of the meat was the act of Ellison, and with the consent of the prosecutor, and the defendants only aided and abetted Ellison, they would not be guilty, but if the plan or plot was only to detect the crime, and not bring it about, the prisoners would be guilty, if in fact they feloniously broke and entered, or with a felonious intent, and without the owner's consent, removed any part of the meat, was not error. A man may direct a servant to appear to encourage the design of the thieves, and to lead them on till the offense is complete, so long as he did not induce the original intent, but only provided for its discovery after it was formed. If a man is suspected of an intent to steal, and another, to try him, leaves property in his way, which he takes, he is guilty of larceny. But it would not be the case, if the master had directed the servant to deliver the property to the thief, instead of directing him to furnish facilities for his arriving at the place where it was kept. Citing *Dodge v. Brittain*, Meigs, 84; *Kemp v. State*, 11 Humph. 320.

In *State v. Jansen*, 22 Kans. 498, a detective having disclosed to the police the place of an intended burglary, the proprietor of the building, upon the direction of the police, left the rear door, usually locked and barred, unfastened, but closed, and in the night the defendant, with the detective, entered that door, the defendant lifting the latch and opening it, and were arrested by the police and the proprietor, who were lying in wait inside. *Held*, that a refusal to instruct that this was not burglary, and leaving it to the jury whether the proprietor consented, was not error.

The Michigan Supreme Court, on the subject of decoying persons into crime, in *Saunders v. People*, 38 Mich. 218, make the following wise observations: "Where a person contemplating the commission of an offense approaches an officer of the law and asks his assistance, it would seem to be the duty of the latter, according to the plainest principles of duty and justice, to decline to render such assistance, and to take such steps as would be likely to prevent the commission of the offense, and tend to the elevation and improvement of the would-be criminal, rather than to his farther debasement. Some courts have gone a great way in giving encouragement to detectives in some very questionable methods adopted by them to discover the guilt of criminals; but they have not yet gone so far, and I trust never will, as to lend aid and encouragement to officers who may, under a mistaken sense of duty, encourage and assist parties to commit crime, in order that they may arrest and have them punished for so doing. The mere fact that the person contemplating the commission of a crime is supposed to be an old offender can be no excuse, much less a justification for the course adopted and pursued in this case. If such were the fact, then the greater reason would seem to exist why he should not be actively assisted and encouraged in the commission of a new offense which could in no way lead to throw light upon his past iniquities, or aid in punishing him therefor, as the law does not contemplate or allow the conviction and punishment of parties on account of their general bad or criminal conduct, irrespective of their guilt or innocence of the particular offense charged and for which they are being tried. Human nature is frail enough at best, and requires no encouragement in wrong-doing. If we cannot assist another and prevent him from violating the laws of the land, we at least should abstain from any active efforts in the way of leading him into temptation. Desire to commit crime and opportunities for the commission thereof would seem sufficiently general and numerous, and no special efforts would seem necessary in the way of encouragement or assistance in that direction."

Frasher v. State.

FRASHER V. STATE.

(3 Tex Ct. App. 263.)

Criminal law — constitutional law — miscegenation.

A statute making it felony for a white person to marry a negro or a person of mixed blood is not in conflict with the Federal Constitution.*

CONVICTION of unlawful marriage. The opinion states the facts.

F. J. McCord, for appellant.

George McCormick, assistant attorney-general, for the State.

ECTOR, P. J. The indictment in this case charges that on March 18, A. D. 1875, in the county of Gregg and State aforesaid, one Charles Frasher, late of the said county, being then and there a white man, did then and there unlawfully, knowingly, and feloniously marry a negro, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State.

The indictment is based upon article 386 of our Criminal Code (Pasc. Dig., art. 2016), which reads as follows:

"Art. 2016. If any white person shall, within this State, knowingly marry a negro or a person of mixed blood descended from negro ancestry to the third generation inclusive, though one ancestor of each generation may have been a white person, or having so married in or out of the State, shall continue within this State to cohabit with such negro or such descendant of a negro, he or she shall be punished by confinement in the penitentiary not less than two nor more than five years."

The defendant was tried at the July term, 1877, of the District Court of Gregg county, and was convicted, and his punishment assessed at four years' confinement in the penitentiary.

The counsel for the defendant insists that the act of 1858, under which this prosecution was had, is in conflict with the 14th and 15th amendments of the Constitution of the United States and the

*See, to same effect, *Green v. State* (58 Ala. 190), 29 Am. Rep.

first section of the Civil Rights Bill ; that the statute prohibiting such marriages was passed in the interest of slavery, before that institution was abolished, and when the negro was not a citizen of the United States ; and that it cannot be enforced, because it prescribes a penalty to be inflicted upon the white person alone.

The first question, then, presented for the consideration of this court is, whether the positions assumed, as above stated, by the defendant's counsel, or any one of them, are correct. We are not unmindful of the importance of the questions involved, and have given them our most careful and thoughtful consideration. No question more important in its consequences, or more profoundly interesting to the people of this country, has ever been before this court. The 1st and 5th sections of the 14th amendment to the Constitution are in these words :

"Sec. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

"Sec. 5. The Congress shall have power to enforce by appropriate legislation the provisions of this article."

XVth Amendment: "1. The right of the citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color or previous condition of servitude.

"2. The Congress shall have power to enforce this article by appropriate legislation."

It is evident that the 15th amendment has no application or bearing whatever upon the question at issue.

The 14th amendment contains four separate and distinct propositions. First, it confers the right of citizenship upon all persons born or naturalized in the United States, and who are subject to the jurisdiction thereof ; second, it declares that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ; third, it prohibits any State from depriving any citizen of life, liberty, or property, without due process of law ; fourth, it provides that no State shall deny

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to any person within its jurisdiction the equal protection of the law.

In placing a construction upon a Constitution, or any clause or part thereof, a court should look to the history of the times, and examine the state of things existing when the Constitution or any part thereof was framed and adopted, to ascertain the old law, the mischief and the remedy. The court should also look to the nature and objects of the particular powers, duties and rights in question, with all the lights and aids of contemporary history, and give to the words of each provision just such operation and force, consistent with their legitimate meaning, as will fairly secure the end proposed. *Kendall v. The United States*, 12 Pet. 524; *Prigg v. The Commonwealth*, 16 id. 539.

In the *Slaughter-house* cases the Supreme Court of the United States, in referring to the 13th, 14th and 15th amendments of the Constitution, say: "An examination of the history of the causes which led to the adoption of those amendments, and of the amendments themselves, demonstrates that the main purpose of all the three last amendments was the freedom of the African race, the security and perpetuation of that freedom, and their protection from the oppression of the white men who had formerly held them in slavery. In giving construction to any of these articles it is necessary to keep this main purpose in view, though the letter and spirit of these articles must apply to cases coming within their purview, whether the party concerned be of African descent or not."

We will now proceed briefly to construe the first section of the 14th amendment. The first clause of this amendment reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." This clause declares and determines who are citizens of the United States, and how their citizenship is created. Before its enactment there had been much diversity of opinion among jurists and statesmen whether there was any citizenship independent of that of State citizenship, and, if any existed, as to the manner in which it originated. To remove this difficulty, primarily, and to establish a clear and comprehensive definition of citizenship, and to declare what should constitute citizenship of the United States, and also citizenship of a State, the first clause of the first section was framed.

It clearly recognizes the distinction between citizenship of the United States and citizenship of a State. A person must reside within a State to make him a citizen of it. He must be born or naturalized in the United States to be a citizen of the Union. The Supreme Court of the United States, in construing this clause, say: "That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls and citizens or subjects of foreign States, born within the United States." *Slaughter-house cases*, 16 Wall. 36.

The language of the second clause of the section under consideration is: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

The first mention of the words "privileges or immunities" is found in the fourth of the articles of the old Confederation. In the Constitution of the United States, which superseded the Articles of Confederation, we find in section 2 of the fourth article the following words: "The citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States." This clause of the Constitution has been construed.

The first and leading case on the subject is that of *Corfield v. Coryell*, decided by Justice WASHINGTON in the Circuit Court for the District of Pennsylvania in 1832. "The inquiry," he says, "is, what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: Protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may generally prescribe for the general good of the whole." *Corfield v. Coryell*, 4 Wash. C. C. 380.

This definition of the privileges and immunities of the citizens of the States is adopted in the main by the Supreme Court of the

United States in the case of *Ward v. The State of Maryland*, 12 Wall. 430. See, also, *Paul v. Virginia*, 8 id. 180.

This clause under consideration did not profess to control the power of the State governments over the rights of their own citizens. Its intent and purpose was to declare to the several States that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify them, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of the other States, within your jurisdiction. It was never the purpose of the 14th amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States, to transfer the security and protection of all the civil rights embraced within the entire dominion of privileges and immunities of citizens of the States from the States to the Federal government. *Crandall v. Nevada*, 6 Wall. 36.

It may be said that the cases cited were decided before the passage of the 14th amendment to the Federal Constitution. The Supreme Court of the United States, since the passage of the 14th amendment, have had occasion to construe this clause. The following extract is taken from the opinion of the court :

“Was it the purpose of the 14th amendment, by the simple declaration that no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned from the States to the Federal government? And when it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?”

“All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction, followed by the reversal of the judgment of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legis-

lation of the States on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights as they existed at the time of the adoption of this amendment. The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of the instrument.

“But when, as in the case before us, the consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when, in fact, it radically changes the whole theory of the relations of the State and Federal government to each other, and of both these governments to the people, the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

“We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.” 16 Wall. 36.

Again, in the case of *Minor v. Happersett*, the same court held “that the 14th amendment of the Constitution of the United States does not add to the ‘privileges or immunities’ of citizens, but only furnishes additional protection for the privileges, etc., already existing.” 21 Wall. 162.

The third clause of the section is as follows: “Nor shall any State deprive any person of life, liberty, or property without due process of law.” “Due process of law” is the application of the law as it exists, in the fair and regular course of administrative procedure.

The fourth clause of the 14th amendment is: “Nor shall any State deny to any person within its jurisdiction the equal protection of the law.” This clause was added in the abundance of caution, for it provides in express terms what was the fair, logical and just implication from what had preceded it, and *that was* that persons made citizens by the *amendment* should be protected by the laws in the same manner and to the same extent that white citizens were protected.

In the *Slaughter-house* cases, 16 Wall. 36, the Supreme Court of the United States say: “We doubt very much whether any action

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of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other."

It is urged that the Civil Rights Bill has abrogated the section of our statute under which the indictment in this cause was found. The first section of the Civil Rights Bill is in these words: "That all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and that such citizens, of every race and color, without regard to any previous condition of slavery, or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to have the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white persons, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding."

The first section of the act known as the Civil Rights Bill confers upon persons of the African race the power to make and enforce contracts. The power as conferred in the first part of the section is without limitation, but in the latter part of the section is expressly restricted and qualified by the plain declaration that the rights conferred shall be enjoyed in the same manner and to the same extent "as is enjoyed by white persons."

It therefore becomes necessary to inquire whether Congress possesses the power under the Federal Constitution to pass a law regulating and controlling the institution of marriage in the several States of this Union.

Mr. Justice NELSON, in delivering the opinion of the Supreme Court of the United States in the case of *The Collector v. Day*, 11 Wall. 113, says: "It is a familiar rule of construction of the Constitution of the Union that the sovereign powers vested in the State governments by their respective Constitutions remain unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of

the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: 'The powers not delegated to the United States are reserved to the States respectively, or to the people.' The government of the United States can, therefore, claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication. The general government and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. The former, in its appropriate sphere, is supreme, but the States, within the limits of their powers not granted, or in the language of the 10th amendment, 'reserved,' are as independent of the general government as that government in its sphere is independent of the States."

To the same purport are *Fifield v. Close*, 15 Mich. 505; *The State v. Gaston*, 73 N. C. 93; s. c., 21 Am. Rep. 459; *The State v. Gibson*, 36 Ind. 389; s. c., 10 Am. Rep. 42; *The People v. Brady*, 40 Cal. 198; *Lane County v. Oregon*, 7 Wall. 76; *The United States v. Cruikshank*, 2 Otto, 542; *Bradwell v. The State*, 16 Wall. 130; *Gibbons v. Ogden*, 9 Wheat. 203.

Within this class which is not granted or secured by the Federal Constitution, but left to the exclusive protection of the States, is that immense class of legislation mentioned by Chief Justice MARSHALL in *Gibbons v. Ogden*, 9 Wheat. 203, which embraces every thing within the territory of a State not surrendered to the general government, and which is necessary in the regulation of the police, morals, health, internal commerce, and general prosperity of a community, and which is justly subject to State regulation. See, also, *The Commonwealth v. Kemball*, 24 Pick. 359.

Mr. Justice STORY, in *Prigg v. The Commonwealth*, 16 Pet. 625, says: "To guard, however, against possible misconstruction of our views, it is proper to state that we are by no means to be understood in any manner whatever to doubt or interfere with the police power belonging to the States in virtue of their general sovereignty. That police power extends over all subjects within the territorial limits of the States, and has never been conceded to the United States."

The police power of the States is very ably discussed by the Supreme Court of the United States, in the case of *The City of*

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New York v. Miln, 11 Pet. 139. In this last case cited the court says, "that all those powers which relate to merely municipal legislation, or what may more properly be called internal police, are not thus surrendered or restrained; and that consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive."

Mr. Justice BUSKIRK, of the Supreme Court of Indiana, has so ably discussed the question, in an opinion delivered by him, that at the expense of being tedious we will copy a portion of what he has said, fully indorsing the same. He says: "There can be no doubt that Congress possesses the power to determine who may or may not make contracts, and prescribe the manner of their enforcement in the District of Columbia and in all other places where the Federal government has exclusive jurisdiction; but we deny the power and authority of Congress to determine who shall make contracts, or the manner of enforcing them, in the several States. Nor is there any doubt that Congress may provide for the punishment of those who violate the laws of Congress; but we deny the power of Congress to regulate, control, or in any manner to interfere with the States in determining what shall constitute crimes against the laws of the State, or the manner or extent of punishment of persons charged and convicted with the violation of the criminal laws of a sovereign State. In this State marriage is treated as a civil contract; but it is more than a civil contract. It is a public institution established by God himself, is recognized in all Christian and civilized nations, and is essential to the peace, happiness, and well-being of society. In fact, society could not exist without the institution of marriage, for upon it all the social and domestic relations are based. The right in the States to regulate and control, to guard, protect, and preserve this God-given, civilizing, and Christianizing institution, is of inestimable importance, and cannot be surrendered, nor can the States suffer or permit any interference therewith. If the Federal government can determine who may marry in a State, there is no limit to its power. It can legislate upon all subjects growing out of this relation. It can determine the rights, duties, and obligations of husband and wife, parent and child, guardian and ward. It may pass laws regulating the granting of divorces. It may assume, exercise, and absorb all the powers of a local and domestic character. This would result in the destruction of the States." *The State v. Gibson*, 36 Ind. 389; s. c., 10 Am. Rep. 42.

Mr. Bishop, in his standard work on Marriage and Divorce (vol. 1, 4th ed., § 87), says: "All our marriage and divorce laws, and, of course, all statutes on the subject, so far as they pertain to localities embraced within the territorial limits of the particular States, are State laws and State statutes; the National power with us not having legislative or judicial cognizance of the matter within their localities."

Marriage is not a contract protected by the Constitution of the United States, or within the meaning of the Civil Rights Bill. Marriage is more than a contract within the meaning of the act. It is a civil *status*, left solely by the Federal Constitution and the laws to the discretion of the States, under their general power to regulate their domestic affairs. The rights, obligations, and duties arising from it are not left to be regulated by the agreement of the parties, but are matters of municipal regulation, over which the parties have no control.

The Supreme Court of North Carolina, in the very recent case of *The State v. Kennedy*, 76 N. C. 251; s. c., 22 Am. Rep. 683, says: "There can be no doubt of the power of every country to make laws regulating the marriage of its subjects, to declare who they may marry, how they may marry, and the consequences of their marrying." It is clear to our minds that neither the 14th amendment nor the Civil Rights Bill has abrogated article 386 of our Criminal Code. Pasc. Dig., art. 2016.

Again, the counsel for the defendant insists, that because the statute under which the indictment was found in this case affixes a penalty upon the white person alone, and none upon the negro, it therefore violates the 14th and 15th amendments of the Constitution of the United States, and the 1st section of the Civil Rights Bill. It is conceded by him, that if the statute upon which this prosecution is based punished both the white person and the negro alike, it would not be obnoxious to the objections he urges against it, but would be constitutional, and clearly within the legislative powers of the State.

It is, then, conceded that the States can prohibit the intermarriage of the races, and it therefore follows, as the night follows the day, that this State can enforce such laws as she may deem best in regard to the intermarriage of whites and negroes in Texas, provided the punishment for its violation is not cruel or unusual. If she cannot, what is to prevent it? The objection to our statute,

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that it does not punish both parties alike, should be addressed to the legislative, and not to the judicial, branch of the government. Can it be truly said that the law is illegal, because the race sought to be protected by "the amendments" and "the Civil Rights Bill" is not punished?

Civilized society has the power of self-preservation, and marriage being the foundation of such society, most of the States in which the negro forms an element of any note have enacted laws inhibiting intermarriage between the white and black races. And the courts, as a general rule, have sustained the constitutionality of such statutes.

We are aware that the Supreme Court of Alabama, Judge SARGOLD delivering the opinion of the court, has held that a statute of that State which prohibited the intermarriage of whites and negroes was abrogated by the 14th amendment to the Federal Constitution; but this opinion is not supported by reason or authorities. *Burns v. The State*, 48 Ala. 195; s. c., 17 Am. Rep. 34.

Has the law of this State, passed in 1858, making it a felony for a white person to marry a negro, been repealed? We think not. Implied repeals are not favored; nothing but a statute will repeal a statute. Sedgw. on Stat. and Const. Law, 96, 105.

During the period since the negroes were emancipated the law-making power of Texas has not only failed to repeal article 2016, but the legislature of 1866, chapter 128, page 131, in repealing laws "relating to slaves and free persons of color," expressly "provided, nevertheless, that nothing herein shall be so construed as to repeal any law prohibiting the intermarriage of the white and black races." The Constitution of 1869, chapter 12, section 27, legalized the marriage of those who had been living together as husband and wife, *and both of whom, by the law of bondage*, were precluded from the rites of marriage; but this only applied to negroes. See *Clements v. Crawford*, 42 Tex. 601.

It has always been the policy of this State to maintain separate marital relations between the whites and the blacks. It is useless for us to cite the different statutes on this subject, enacted from time to time, showing that the people of Texas are now, and have ever been, opposed to the intermixture of these races. Under the police power possessed by the States they undoubtedly, in our judgment, have the power to pass such laws. If the people of other States desire to have an intermixture of the white and black races,

they have the right to adopt such a policy. When the legislature of this State shall declare such a policy by positive enactment, we will enforce it; until this is done, we will not give such a policy our sanction.

The defendant moved the court to quash the indictment because the same does not charge any offense known to the law, and because it does not allege that said party married a negro within the third generation inclusive. The court properly overruled defendant's motion to quash. By recurring to article 386 of our Criminal Code (Pasc. Dig., art. 2016), it will be seen that it is made a felony for any white person in this State to knowingly marry a negro, or a person of mixed blood descended from negro ancestry to the third generation inclusive, etc. In this case the indictment charges that the defendant was a white person, and that he knowingly married a negro.

[But for a technical] error in the charge of the court the judgment must be reversed and the cause remanded.

Reversed and remanded.

COLLINS V. STATE.

(3 Tex. Ct. App. 393.)

Criminal law — jurisdiction — alteration of boundary.

Where a boundary stream gradually alters its channel the boundary follows the channel; but where it changes violently and visibly, the boundary remains in the abandoned channel.

CONVICTION of malicious mischief. The opinion states the facts.

Crawford & Crawford, for appellant.

George McCormick, assistant attorney-general, for the State.

EDITOR, P. J. The defendant, Tyler Collins, was tried and convicted by the county court of Bowie county for malicious mischief, and his punishment assessed at \$300. The information charges that the defendant, on May 1, 1875, in the county of Bowie, did

willfully kill a certain bay mare, the property of one W. A. Shaw, with the intent to injure the owner, and that by said killing the said W. A. Shaw was damaged \$100.

There is no proof of venue as charged in the information. The evidence not only fails to show that the offense was committed in Bowie county, but does show that the mare was killed in the Choctaw Nation. The evidence shows that a bay mare belonging to W. A. Shaw was killed about the time mentioned in the indictment.

Sidney Hughes, the first witness introduced by the State, testified that the defendant said: "Mr. Shaw killed a hog of mine, and I took my gun and killed two of his best mares." The defendant did not say where he killed them.

The proof shows that a bay mare, the property of W. A. Shaw, was found dead in the spring of 1875. She had been shot just behind the shoulder-blade, and from the appearances on the ground, seemed to have dropped dead instantly. She was lying four feet from the top of the bank of the old river, in the cut-off known as that portion of the Choctaw Nation which was cut off by a change of the channel of Red river. There are about 150 acres of land in the cut-off. There is nothing now but a lake where the old river used to run. The trees in the old river-bed had grown up to be large saplings. The old river was originally the boundary between Bowie county, Texas, and the Choctaw Nation.

This whole case depends upon the present boundary line of Bowie county, or as to whether the place where the mare was killed is in Bowie county or in the Choctaw Nation.

If the course of a river is suddenly changed, the relict soil remains according to the former bounds. When a deed calls for a line along the bank of a river, and after the date of the deed the bank of the river is changed by excessive floods or high water producing violent or visible alterations, the boundary line will not shift according to the changes of the river, but will be where the bank was at the time of the date of the deed. But if a river by degrees gains upon the land of a person on one side, and thereby leaves the other dry, the owner who loses his ground has no remedy. Ang. on Water-courses, 52, § 57; 2 Bla. Com. 362.

In the case of *Holbrook v. Moore*, 4 Neb. 437, the court holds that a change in the main channel of the Missouri river does not alter the boundary line between Iowa and Nebraska as established by Congress. It remains as before, in the old abandoned river-bed.

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The land lying in the "cut-off" between the old river and the new channel, as testified to by the witnesses in this case, is in the Choctaw Nation, and the old river-bed is the boundary line between Texas and the Choctaw Nation at that point.

The judgment of the county court is reversed and the cause dismissed.

Reversed and dismissed.

FOX V. STATE.

(8 Tex. Ct. App. 339.)

Criminal law — adultery — subsequent marriage.

The criminal offense of adultery is not excused by the absence of a guilty intent, unless a guilty knowledge is part of the statutory definition, nor is it excused by the subsequent inter-marriage of the parties.

CONVICTION of adultery. The opinion discloses the facts.

Shannon & Moran, for appellant.

George McCormick, assistant attorney-general, for the State.

WINKLER, J. The indictment charges "that on, to wit, the first day of March in the year of our Lord eighteen hundred and seventy-six, in the county of Parker, State of Texas, and on divers times before and after said date, one Lovis Rutter, who was then and there a married woman (that is to say, she was then and there the wife of Charles Rutter), and Emp Fox, who was then and there a man, did unlawfully live together in a state of cohabitation, and did unlawfully live together in adultery, and did unlawfully there and then commit the crime of adultery, and that they did then and there, on divers times, unlawfully and carnally know each other, and did then and there, and for a long time before and after said date, live together and cohabit together," etc.

In this case the appellant, Fox, was tried alone and convicted and his punishment assessed at a fine of \$100, and after motion for a new trial overruled, this appeal is taken.

Two propositions are urged in the brief of the appellant as reasons why the judgment should be reversed, and which may be stated thus:

First, that, to justify a conviction of this appellant, the proof should show that he knew, at the time the offense is alleged to have been committed, that the person with whom the adultery is alleged was a married woman; and secondly, that by a marriage with the other person, after the commission of the offense, he became entitled to an acquittal.

And in connection with this latter view of the case, we find in the record a bill of exceptions, as follows: "The defendant offered to introduce evidence of a valid marriage, subsequent to the decree of divorce between Rutter and this defendant and the void marriage of the 20th of February, and subsequent to the presentment of the indictment herein, by and between the same parties; offering to prove the same by the witness F. M. Stanley and by the county clerk of said county, and return of license on file in said clerk's office, which evidence was ruled out by the court, and not permitted to go to the jury; to which ruling the defendant's counsel reserved their bill of exceptions."

With reference to the first proposition, the statute provides "that every man and woman who shall live together in adultery * * * shall be punished," etc.; and "it is sufficient to prove, in trial for living in adultery, that the parties cohabit together, and that one of them is married to some other person." Penal Code, arts. 392, 393; Pasc. Dig., arts. 2022, 2023.

It is the *act* of living together, and not the knowledge or intent, that constitutes the offense. When the statement of the act itself necessarily includes a knowledge of the illegality of the act, no averment of knowledge or bad intent is necessary. It is otherwise when guilty knowledge is a substantive ingredient of the offense. It has been held unnecessary in an indictment for adultery to allege a *scienter*. Under statutes the distinction has been taken that, when the guilty knowledge is part of the definition of offense, it must be averred; but not otherwise. Whart. Cr. Law, § 297, and notes.

We hold, therefore, that in an indictment for living in adultery it is sufficient to allege the fact, and not necessary to charge a guilty knowledge upon the parties; and, it not being necessary to aver such knowledge, it would be unnecessary to prove it: and in this

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case it is no objection to the conviction that it was not proved on the trial that this party knew at the time that the other party was the wife of another man. Besides, we think the circumstances proved on the trial that this party had knowledge of the fact, or at least had the means of informing himself at hand, if he deemed it a matter of any consequence to him.

The other proposition, that by procuring a divorce for the married party from her legal consort, and subsequent marriage, would constitute a defense to the charge, refutes itself. It not only admits the case, but fails to afford any excuse therefor. The most it could have done was to show contrition, and a disposition to make amends to the violated law, in mitigation of the penalty, if this were permissible; but it was no defense. In law the married woman remained the wife of her husband up to the time the matrimonial tie was severed by the decree of separation, if such was the case.

These views have been presented because of the earnestness with which these subjects have been urged by the appellant's counsel. We might have excused ourselves from doing more than to note the fact that there is no assignment of error in the record, the case being a misdemeanor.

The charge in the indictment is supported by the evidence, and the judgment is affirmed.

Affirmed.

BURTON V. STATE.

(3 Tex. Ct. App. 408.)

Criminal law — indictment — assault with pistol.

An indictment charging an assault with a pistol, alleging that it was a deadly weapon, is not bad for not charging that it was loaded, nor presented within range.

CONVICTION of aggravated assault. The indictment alleged that the accused, "with a certain pistol, which he the said John I. Burton in his hands then and there had and held, and which pistol was then and there a deadly weapon, in and upon one Eddie Currie, in the peace of God and of the said State then and there being, unlawfully, willfully, and with intent then and there to injure

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the said Eddie Currie, an aggravated assault did make, and that the said John I. Burton did then and there, with the pistol aforesaid, unlawfully, willfully, and with intent to injure the said Eddie Currie, point at, upon, and against the body of the said Eddie Currie, then and there, by said pointing, exciting in the mind of the said Eddie Currie fear of serious bodily injury; against the peace and dignity of the State."

Earle Adams, for appellant.

W. B. Dunham, for the State.

WHITE, J. Appellant was indicted for an aggravated assault, found guilty of a simple assault, and his punishment affixed at a fine of one cent.

It is insisted that the motion to quash the indictment should have been sustained. The main grounds of the motion were that the indictment did not charge that defendant presented the pistol at the assaulted party within carrying distance; that the indictment did not show how the defendant attempted to use the pistol; and that the indictment was duplicitous.

The indictment in the case of *Crow v. The State*, 41 Tex. 468, is very similar to the one in this case, and in that case the indictment — which was, if any thing, more liable to the objection of duplicity than the one we are considering — the court held to be good, and the objection untenable; citing *The State v. Dorsett*, 21 Tex. 657, and *The State v. Smith*, 24 id. 286.

In the case of *Mayfield v. The State*, 44 Tex. 59, it was held that it was not necessary, in an indictment for an assault with intent to murder, charged to have been made with a pistol, to allege that the party making the assault was within carrying distance of the pistol to the party assaulted; citing *The State v. Rutherford*, 13 Tex. 24. And in the same case of *Mayfield v. The State*, 44 id. 59, it is further said that "it was not necessary to have named the weapon with which the assault was committed, or the manner in which it was used;" citing *Bittick v. The State*, 40 Tex. 117; *Martin v. The State*, id. 19; *The State v. Walker*, id. 485, and *The State v. Croft*, 15 id. 575.

We see no reason why such allegations are any more essential to the validity of an indictment for an aggravated assault, when the offense is alleged to have been committed with a deadly weapon,

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than to one for an assault with intent to murder. The court did not err in overruling the motion to quash, the indictment being good. *Browning v. The State*, 2 Tex. Ct. App. 47.

Another error complained of is that the court charged the jury that it was incumbent upon the defendant to show that the pistol was not loaded. This point was also made in the case of *Crow v. The State*, above cited, and the court says "there was no error in instructing the jury that, while pointing an unloaded gun at a person would not be an assault, the burden of proving it to be unloaded was on the defendant. *Caldwell v. The State*, 5 Tex. 20; Whart. Cr. Law, § 1244. The Code does not change the rule of evidence on this point." 41 Tex. 468; *Flournoy v. The State*, 16 id. 31.

The charge of the court presented the law applicable to the evidence, and we are of opinion that the evidence was sufficient to sustain the verdict and judgment. *Pinson v. The State*, 23 Tex. 581; *Higginbotham v. The State*, id. 574; *Bell v. The State*, 29 id. 492.

The judgment of the lower court is affirmed.

Affirmed.

DEMPSEY V. STATE.

(3 Tex. Ct. App. 429.)

Criminal law — trial — right to read books to jury.

On a trial for felony, the prisoner's counsel, in his argument to the jury, proposed to read to them a statement of facts on an appeal in the same case, and the decision of the appellate court holding the evidence insufficient to convict, with a view to argue that the present evidence was also insufficient. The court refused to allow the reading. *Held* no error.

CONVICTION of theft. The opinion states the facts.

No brief for appellant.

S. S. Johnson, for the State.

WINKLER, J. The only subject requiring investigation arises upon the following bill of exceptions set out in the transcript :

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“Be it remembered that on the trial of the above-stated cause, after the evidence had closed and the county attorney had made the opening speech, the counsel for the defendant, in addressing the jury, desired to read to the jury the statement of facts made out by the judge presiding on a former appeal in this cause, and also the decision of the Supreme Court rendered therein, for the purpose of showing that under said statement of facts and said decision, as compared with the facts in evidence on the present trial, the jury should acquit for want of sufficient evidence; whereupon the court refused to permit counsel to read said statement of facts and said decision.”

To this bill of exceptions the judge appends several reasons for his ruling, one of which is: “Because, in the opinion of the court, it is the proper practice that the law should be read to the court, and not to the jury;” and another ground for the ruling is stated thus: “Because the jury are in effect sworn to decide the guilt or innocence of the defendant according to the law as given them in charge by the court, and the evidence as detailed by the witnesses in the particular case then on trial, and to permit counsel to read to the jury selected cases from law-books, or even from a former decision of the same case then on trial, would tend to divert their minds from the true issues before them, and which they were sworn to decide; the court having the power, in a proper case, to grant a new trial, when it is believed that the evidence is insufficient to sustain the verdict.”

In determining the question here presented, the inquiry naturally arises in the mind, what purpose was intended to be effected, what interest to be subserved, by the request of counsel? What bearing was it supposed the reading to the jury, in argument (not as evidence), the statement of facts as made upon a former trial and the decision upon them, might have upon the trial then progressing?

We are not left in doubt on the subject. The bill of exceptions informs us that the request was made “for the purpose of showing that under said statement of facts and said decision, as compared with the facts in evidence on the present trial, the jury should acquit for want of sufficient evidence.”

To our minds, the result of admitting the reading of the documents the counsel desired to read would not only have enabled the counsel to at least comment upon and compare the evidence given on a former trial with that on the trial then on hand, but by thus inter-

mingling the two in the minds of the jury, have most likely produced erroneous impressions likely to have a damaging effect on the result of the trial, if in no other way than by indirectly impeaching the witnesses by pointing out any real or supposed discrepancies between the statements of the witnesses on the two examinations, instead of pursuing the direct means allowed by law for that purpose. We do not wish to be understood as intimating that such was intended in the present case, but that to sanction such a practice would open the door to the results intimated.

If the statement of facts made upon a former trial had been offered in evidence on a subsequent trial, it would have been inadmissible, under any circumstances, except for the purpose of impeaching a witness, or in case of the death of a witness after the former, and before the subsequent trial. We are of opinion that the presiding judge was not guilty of any abuse of the discretion given him in such matters, and that there was no error in the ruling complained of.

In *Warren v. Wallis, Landes & Co.*, 42 Tex. 472, a question arose somewhat similar to the one now under consideration, the material difference between the two being that in that case the mandate and opinion of the Supreme Court, on a former trial on appeal of the same case, were offered in evidence at a subsequent trial, whilst in this case the statement of facts and the decision of the Supreme Court on a former trial were offered to be read in argument before the jury. In that case Mr. Justice REEVES, delivering the opinion of the court, says: "The discussion of the evidence in the opinion of the Supreme Court, and the reasons given for the judgment, were not questions for the consideration of the jury on a subsequent trial." And again: "The issues of fact were questions for the jury, to be decided from the evidence introduced on that trial, and not from evidence which may have been before another jury on a former trial."

On the general questions embraced in the bill of exceptions under consideration, as to the propriety of permitting counsel, in argument of a cause, to read from books, the authorities are to the effect that the whole subject is within the sound discretion of the court, and not subject to revision on appeal except in a clear case of abuse of such discretion.

In the case of *Wade v. De Witt*, 20 Tex. 398, a question arose quite similar to the one here being considered. The Supreme Court was

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then composed of Judges HEMPHILL, WHEELER, and ROBERTS, the first-named being at the time, and both the others subsequently, at different periods, the chief justice of the court. Mr. Justice WHEELER, delivering the opinion of the court, says: "It is insisted for the appellant that the court erred in refusing to permit his counsel to read and comment to the jury upon a medical work, as shown by bill of exceptions"; and then he quotes, approvingly, from *Legg v. Drake*, 1 Ohio St., 286, where a similar question arose, and the court said: "While the right of a party to be heard by his counsel on the trial of his cause is not to be questioned, and is often of great service in the investigation of both law and fact, yet inasmuch as this privilege may be liable to abuse, to the great hindrance and annoyance of courts in the progress of business, the extent and manner of its exercise must in some measure rest in the sound discretion of the court. Although unlimited range and extent is not allowed to counsel in their addresses to the court and jury, yet no pertinent and legitimate process of argumentation, within the appropriate time allowed, should be restricted or prohibited. And it is not to be denied but that a pertinent quotation or extract from a work on science or art, as well as from a classical, historical, or other publication, may, by way of argument or illustration, be not only admissible, but sometimes highly proper, and it would seem to make no difference whether it was repeated by counsel from recollection, or read from a book. It would be an abuse of this privilege, however, to make it the pretense of getting improper matter before the jury as evidence in the cause. * * * The privilege of counsel, in their addresses to the jury, to read from legal authorities, or from works of general science, extracts pertinent to the case, in support of their argument, ought not to be abridged. It is a valuable privilege; for as has been well said, an able and diligent advocate could scarcely sum up a case of any magnitude without repeating, either from memory or from books, the principles of law bearing on the controversy, as laid down by the best authors. And when authorities are to be cited, it is better, in order to avoid mistakes, that they should be produced in court, to speak for themselves, than that the doctrine inculcated by them should be taken from the mouth of counsel." Citing 2 Gra. & Wat. on New Tr. 685.

The opinion proceeds as follows: "Yet this privilege is so susceptible of abuse that the extent and manner of its exercise must

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be intrusted in a great measure to the sound discretion of the court. It is more reasonable to suppose the court will not abridge it improperly than that the advocate, actuated by a strong desire for success and triumph over his adversary, will not abuse it. It is better for the administration of justice and the protection of the rights of parties that the exercise of this privilege should be regulated by judicial discretion, than that it be left to the unlimited discretion of counsel governed by the powerful motives of interest and ambition. And I apprehend it would require a clear case of the abuse of judicial discretion, to the injury of the party, to authorize the reversal of the judgment for such a cause. It ought clearly to appear that the rights of the party were denied, or improperly abridged, by the court, to make a matter of this kind a ground for reversal."

In criminal trials especially, however, whilst the juries are the exclusive judges of the evidence and the weight and credibility of the witnesses, yet they are bound to receive the law from the court and be governed thereby. This law is found in the charge of the court alone, not elsewhere.

We find no error in the judgment. The law of the case was given to the jury in a clear, fair, and forcible manner, in which every right of the accused was carefully guarded, and in as favorable a manner as the testimony warranted.

The evidence was sufficient to support the verdict. The District Court, before which the cause was tried, we think, properly refused to grant a new trial.

The judgment of the District Court rendered in this case is affirmed.

Affirmed.

EX PARTE COOPER.

(3 Tex. Ct. App. 489.)

Constitutional law — tax on dogs.

Dogs are not "property" within the constitutional provisions for taxation; but a statute exempting one dog to each family, and taxing all others at a fixed rate, under a penalty for non-payment, is valid as a police regulation.*

* *Contra: Mayor of Washington City v. Meigs* (1 McArthur, 53), 29 Am. Rep. As to property in dogs see note, 15 Am. Rep. 356.

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HABEAS CORPUS. The relator complained that he was restrained of his liberty, under a charge of keeping and harboring a dog without having paid a tax of \$1 thereupon. The opinion shows the facts.

A. Bradshaw, for relator.

George McCormick, assistant attorney-general, for the State.

WHITE, J. The question presented by relator in this proceeding is the constitutionality of an act entitled "An act to levy a tax on the privilege of keeping or harboring dogs, and to provide for the assessment and collection of the same," approved August 19, 1876, and found in the General Laws of the fifteenth legislature, page 198, chapter 117. As necessary to an understanding of the question, we copy the following portions of the said act, viz.:

"Whereas, there are in many localities in this State a very large number of dogs, and there are strong indications of a prevalence of hydrophobia, from which much danger will result to the lives and property of citizens; therefore:

"SECTION 1. *Be it enacted by the legislature of the State of Texas*, that the keeping of dogs shall be a privilege which shall be taxed as follows: Every owner or harbinger of a dog or dogs shall pay one dollar (\$1) on each dog, to be collected as other taxes of the State and county, and paid into the county treasury for the use and benefit of public free schools in the county; *provided*, that one dog to each family shall be exempt from taxation.

"SEC. 2. That it shall be the duty of the tax assessors to enumerate and assess, as hereinbefore provided, every dog within his county, on the first day of January of each year, and the tax collector shall collect the same. The assessor shall cause each person to state on oath the number and kind of dogs owned or harbored by him or her.

"SEC. 3. That if any person shall keep a dog that has been assessed for taxes under this act, and fail to pay the tax on the same on or before the first day of January next after said assessment is made, he or she shall be guilty of a misdemeanor, and, upon conviction thereof in any court of competent jurisdiction, shall be fined not less than five dollars (\$5) and costs for each dog so kept. And it is hereby made the duty of county attorneys to

prosecute, upon his own motion, all delinquent tax payers under this act."

It is unnecessary to copy the other sections of the act.

Now, it is contended that this act is in conflict with, and violative of, the following provisions of the Constitution of the State of Texas, viz.: Article 3, section 35; article 7, sections 2, 3 and 5; article 8, sections 1 and 9.

The learned counsel for relator, in his earnest and able oral argument of this case, has elaborated many interesting features in the application of these constitutional provisions to the law as quoted, which, however much we feel inclined to examine and discuss, we find it next to impossible to do so in the present opinion. We are not unmindful of their importance, but believing that the case must be determined by ascertaining the law with reference to a few of the main points at issue, we select the subjoined propositions, which we state in the shape of three several pertinent interrogatories, viz.:

1. Are dogs "property" in the sense that they are liable to, and can and should, be taxed *ad valorem* as other property?

2. Is the act in question, technically speaking, a tax, or is it a police regulation as contradistinguished from a tax?

3. And whether a tax or a police regulation, is it in the power of the legislature, if authorized by the Constitution to adopt it, to divert and appropriate the funds thus arising, as has been done, from the general revenue fund to the use and benefit of public free schools, when the Constitution itself has provided what shall constitute the permanent and what the available fund for public-school purposes?

Before proceeding with the examination of these questions, it may be proper to call attention to the language of another provision of the Constitution with reference to taxation. Section 17 of article 8 reads as follows: "The specification of the objects and subjects of taxation shall not deprive the legislature of the power to require other objects or subjects to be taxed in such manner as may be consistent with the principles of taxation fixed in this Constitution." We cite this provision to show that the enumeration of subjects of taxation in the preceding sections of the same article does not limit or confine the power of the legislature to those specified objects and subjects, in passing what might even technically be denominated tax laws.

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The word *tax* means burden, charge, or imposition, put or set upon persons or *property* for public uses. 11 Johns. 77. "In regard to the ownership of live animals, the law has long made a distinction between dogs and cats and other domestic quadrupeds, growing out of the nature of the creatures and the purposes for which they are kept. Beasts which have been thoroughly tamed and are used for burden, or for husbandry, or for food—such as horses, cattle, and sheep—are as truly property of intrinsic value, and entitled to the same protection, as any kind of goods. But dogs and cats, even in a state of domestication, never wholly lose their wild natures and distinctive instincts, and are kept either for uses which depend on retaining or calling into action those very natures and instincts, or else for the mere whim or pleasure of the owner; and therefore, although man might have such right of property in a dog as to maintain trespass or trover for unlawfully taking or destroying it, yet he was held, in the phrase of the books, to have 'no absolute and valuable property' therein which could be the subject of a prosecution for larceny at common law, or even, according to some authorities, of an action of detinue or replevin, or a distress for rent, or which would make him responsible for the trespasses of his dog on the lands of other persons, as he would be for the trespasses of his cattle. Vin. Abr., Trespass, Z, Replevin, A; 2 Bl. Com. 193; 3 id. 7; 4 id. 234, 235; *Millen v. Fanddrye*, Poph. 161; *Mason v. Keeling*, 1 Ld. Raym. 608; s. c., 12 Mod. 335; *Read v. Edwards*, 17 C. B. (N. S.) 245; *Regina v. Robinson*, 8 Cox's C. C. 115. And dogs have always been held by the American courts to be entitled to less legal regard and protection than more harmless and useful domestic animals. *Putnam v. Payne*, 13 Johns. 312; *Brown v. Carpenter*, 26 Vt. 638; *Woolf v. Chalker*, 31 Conn. 121." *Blair v. Forehand*, 100 Mass. 136; s. c., 1 Am. Rep. 94.

In the case of *The State v. Marshall*, 13 Tex. 58, Mr. Justice WHEELER says: "By the common law, though a man may have such property in these animals as to entitle him to maintain a civil action for an injury done them, yet as they are not classed among valuable domestic animals, as horses and other beasts of burden, nor among animals *domitiae naturae*, which serve for food, as neat cattle, swine, poultry and the like, the property in them is considered of so base a nature, and they are held in so little estimation as property, that the stealing of them does not amount to larceny. 4 Bl. Com. 236; 1 Hale, 512. But by statute in England very severe penalties are inflicted

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for the crime of stealing a dog. 4 Bl. Com. 236, note. And in some of the States, dogs are by statute placed upon the same footing as other personal property. Whart. Cr. Law, title Larceny; *Heisrodt v. Hackett*, 34 Mich. 283; s. c., 22 Am. Rep. 529. We have in this State no statute upon the subject.

At the time that decision was made there was no statute making it malicious mischief to kill a dog, but such animals have since been included in that particular statute. Pasc. Dig., art. 2344. Besides that statute, we know of no other recognizing them among the domestic animals, or as property. These authorities, we think, settle the first proposition, and to the effect that, in law, dogs are not recognized as other property and subject to an *ad valorem* taxation.

But second, as was said by GRAY, J., in *Blair v. Forehand*, 100 Mass. 139, already cited above: "All rights of property are held subject to such reasonable control and regulation of the mode of keeping and use as the legislature, under the police power vested in them by the Constitution of the Commonwealth, may think necessary for the preventing of injuries to the rights of others, and the security of the public health and welfare. In the exercise of this power the legislature may not only provide that certain kinds of property (either absolutely; or when held in such a manner or under such circumstances as to be injurious, dangerous or noxious) may be seized and confiscated, upon legal process after notice and hearing, but may also, when necessary to insure the public safety, authorize them to be summarily destroyed by the municipal authorities, without previous notice to the owner — as in the familiar cases of pulling down buildings to prevent the spreading of a conflagration or the impending fall of the buildings themselves, throwing overboard decaying or infected food, or abating other nuisances dangerous to health." 100 Mass. 139, and authorities cited.

In the case of *Tenny v. Lenz*, the Supreme Court of Wisconsin says: "Dogs, though possessing many excellent qualities, are liable, by running mad and destroying sheep, to do great mischief. Hence it is strictly a legitimate exercise of the police power 'to regulate the license and keeping of dogs,' as was done by the act referred to. * * * The exercise of that power is based upon the idea that the business licensed, or kind of property regulated, is liable to work mischief, and therefore needs restraints which shall operate as a protection to the public. For this purpose the license-money is required to be paid." 16 Wis. 566.

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In *Mitchell v. Williams*, 27 Ind. 62, RAY, C. J., says: "In *Thorp v. The Rutland & Burlington Railway Co.*, 27 Vt. 140, it was held that this police power of the State extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property, within the State. Nor can it be denied that the means adopted are legitimate to secure the end in view. It is a matter of no consequence how the sum charged to the owner of the dog may be collected. If it be deemed more convenient to place it upon the tax duplicate, it does not therefore make it a tax, and subject to the constitutional objection." See, also *Morey v. Brown*, 42 N. H. 373; *Baker v. Panola County*, 30 Tex. 86.

And Mr. Cooley, in his work on the Law of Taxation, says: "And though a tax is sometimes levied for revenue upon the keepers of dogs, it is more usual to require the keeping to be licensed, the principal object being to have some person responsible for every animal of the kind that is protected by the law." Cooley on Tax. 412; see, also, 396. It is to be noted that the act we are considering is in harmony with this view, and is "An act to levy a tax on the privilege of keeping or harboring dogs."

[Omitting a minor question.]

Our conclusion of the whole matter is that the act in controversy is not obnoxious to the constitutional objections raised against it, and that it is valid and binding upon the citizens of the State until it is repealed by proper authority. Such being our conclusion; the relator is remanded to custody of N. B. Langsford, constable of Ellis county, and it is further ordered and adjudged by this court that the relator, S. O. Cooper, pay all the costs of this proceeding on *habeas corpus*.

Ordered accordingly.

HARBERGER V. STATE

(4 Tex. Ct. App. 28.)

Original law — larceny — severance and asportation.

The simultaneous removal and carrying away of rails from a fence, with larcenous intent, and without the owner's consent, is theft. (See note, p. 159.)

CONVICTION of theft. The opinion states the facts.

No brief for appellant.

W. B. Dunham, for the State.

ECTOR, P. J. The defendant was charged by indictment with a felony, to wit, the theft of 700 rails, valued at \$5.00 per hundred. He was tried, and was convicted of a misdemeanor, and took an appeal to this court. There are only three questions raised on the record which we deem it necessary to notice in this opinion.

The evidence shows that the rails taken by the defendant were the property of William Spracklin, the person named in the indictment as the owner, and were taken from his fence. It is insisted on the part of the defendant that the act proven (if any) was not a theft, but only a trespass; that the rails, when taken, were a part of the realty, and therefore were not the subject of theft.

The old rule, that the severance and asportation of things annexed to realty should be distinct and several acts, does not obtain in this State. In the case of *Willke, ex parte*, 34 Tex. 155, the applicant was charged with the theft of eleven doors. It was proved that the doors, when taken from the owner, were fastened by hinges to her unoccupied house, and that the accused soon afterward sold them in a neighboring village. It was held, on *habeas corpus*, that though the doors were part of the realty, and not the subject of theft as long as they were attached to the house, yet when severed from the house, they became personal property, and as such were the subject-matter of theft; and even if it had been proved that they were taken from the hinges by the accused, yet his subsequent asportation and conversion of them, without the owner's consent, and with the intent to deprive her of their value, constituted theft in a legal, as well as a moral sense.

We find in the books much subtle reasoning in respect to the difference between trespass and larceny in this class of cases. From an early period in English jurisprudence, it has been held that in consequence of the stable and permanent nature of real estate, an injury to it is not indictable at common law; and therefore it is not larceny to steal any thing adhering to the soil. Hence it was held that if a person, with a felonious intent, severs and carries away apples from a tree, or the tree itself, or growing grass or grain, or copper or lead attached to a building, the offense

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is only a trespass. But if the thing had been previously severed from the soil, whether by the owner or by a third person, or even, on a previous occasion, by the thief himself, it has thus become personal property. This rule involved many technical niceties which have resulted in what appear to us to be pure absurdities. We see no good reason why we should not hold the sensible rule, as was done by our Supreme Court, that by the act of the severance the thief converts the property into a chattel; and if he then removes it with a felonious intent, he is guilty of larceny, whatever may be the despatch employed in the removal.

Mr. Wharton, in treating of this matter, holds that at common law larceny cannot be committed of things which savor of the realty, though when severed the rule is otherwise; and that no particular space is necessary between the severance and the appropriation, only that the two acts must be separated by time, so as not to constitute one transaction. He says it is "otherwise, however, with articles which do not adhere to the freehold, and which may be removed without injury." 2 Whart. Cr. Law, 1753. Thus, a key in the lock of a door of a house has been held to be the subject of larceny. 5 Blackf. 417. And in an Ohio case the doctrine was laid down as follows: "The rule of the common law, that things savoring of the realty are not subjects of larceny, applies only to things issuing out of, or growing upon, the lands, and such as adhere to the freehold, but not to personal chattels which are constructively annexed thereto—as, a leathern belt connecting certain wheels in a saw-mill—and which may be removed readily and without injury." *Jackson v. The State*, 11 Ohio St. 104. See, also, 35 Cal. 671.

[Omitting minor points.]

Judgment affirmed.

NOTE BY THE REPORTER.—In *Holly v. State*, 54 Ala. 238, the court said: "The most approved definition of larceny, at common law, is that given by Mr. East, in his *Crown Law*: 'The fraudulent or wrongful taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner.' 2 East, 524; 3 Greenl. Ev., § 150. An indispensable constituent of the offense thus defined is, that the thing taken must be of goods personal and not of chattels real, or such as are annexed to the freehold. Corn, grass, trees, and the like, adhering to the freehold, were not the subjects of larceny, but the severance of them (according to Blackstone) 'was, and in many things is still, merely a trespass which depended on a subtilty in the legal notions of our ancestors. These things were parcels of the real estate, and therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immovable.' As to the time intervening between the severance and the asporta-

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tion, which would make them separate acts, instead of one continuous act, nice distinctions were made. Sometimes it was held a day must intervene between the severance and the asportation, to make them separate acts, because the law does not recognize a fraction of a day. The better doctrine, however, is, as stated by Mr. Bishop, that no particular space of time is necessary, only the two acts must be so separated as not to constitute one transaction. 2 Bish. Cr. Law, § 679. When by one act the thing was severed from the freehold, and by another distinct act it was carried away with the criminal intent, though before severance it was part of the freehold, it was the subject of larceny. This rule of the common law has been modified from time to time in England, by acts of Parliament, so as to afford protection to things fixed to the freehold, as they became the objects of criminal severance and asportation, and were from their nature exposed to it. The rule was never satisfactory, and the courts, in modern times, were inclined to confine it within the narrowest limits. *Hodkins v. Torrence*, 5 Black. 417; *Jackson v. State*, 11 Ohio St. 104."

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(4 Tex. Ct. App. 54.)

Criminal law — assault with intent to murder — mutual combat by agreement.

In case of a mutual combat waged, where death does not ensue, in order to reduce the offense from assault with intent to murder to aggravated or simple assault, it must appear that the combat was waged upon equal terms, and that no undue advantage was sought or taken by the accused.

CONVICTION of assault with intent to murder. The opinion states the case.

Bill King, in propria persona.

W. B. Dunham, for the State.

WHITE, J. The appellant in this case and one Bill Davis (both negroes) had a quarrel in the town of Farmersville, Collin county, which resulted in an agreement between them to fight with knives. They go together to a store and purchase a butcher-knife apiece, and start in company to the field of combat, Davis riding a pony and defendant walking. We make the following extract from the testimony of the witness Bill Davis, as explanatory of the remaining facts connected with the transaction, there being but an immaterial, if any, apparent discrepancy in the testimony of the several witnesses who were present at the rencounter.

He says: "When about a half-mile from Farmersville, he turned out to some bushes to tie his pony, at which time the defendant

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came up to the head of the pony. Witness dismounted on the left side of the pony, walked round the rear of the pony, catching him by the tail to prevent falling. Witness met the defendant on the right side of the pony, and struck him the first blow with his butcher-knife, cutting a pretty deep and long gash on defendant's forearm, at which time defendant shot witness in the wrist with a derringer pistol. Witness then ran off a little distance and stopped. Defendant reloaded his pistol and started toward witness. Witness ran again; the defendant shot at witness again. Witness stuck his knife in the ground and picked up a rock. Defendant again reloaded his pistol and took after witness again. Witness ran again, and defendant fired upon him again. This ended the fight. Defendant only hit witness the first time he shot at him. The ball is still in the wrist of witness."

The facts thus detailed establish in law a case of mutual combat. And the deliberate agreement of the parties to fight, their choice and procurement of deadly weapons, and the coolness with which they proceed to the field of battle, a half a mile distant, all evidence that formed design which, in cases of homicide, is the essential ingredient of the crime of murder. 4 Bla. Com. 198, and note; Whart. on Hom., § 463, and note; *Lester v. The State*, 2 Tex. Ct. App. 432; *Perry v. The State*, 44 Tex. 473.

The charge of the court presented the law correctly with regard to the law of mutual combat, and the court did not err in refusing the special instructions asked by defendant, there being no evidence adduced on the trial which would make such a charge applicable to the facts. Nor do we think, as is contended by counsel, that the court erred in omitting to charge upon the law of aggravated assault. In our opinion, the facts would not warrant such a charge. To our minds it is clear, from the evidence, that the defendant, after agreeing to fight with knives, sought and attempted to get the advantage by shooting and killing his antagonist with a pistol.

The correct doctrine in cases of mutual combat is that laid down by the Supreme Court of California in *The People v. Sanchez*. They say: "In case of mutual combat, in order to reduce the offense from murder to manslaughter, it must appear that the contest was waged upon equal terms, and no undue advantage was sought or taken by either side; for if such was the case, malice may be inferred, and the killing amount to murder." 24 Cal. 27.

As a whole, the charge of the court was as favorable to defendant as he had any right to expect or demand, and he does not appear to have excepted to it on the trial.

The punishment imposed by the verdict and judgment (two years and three months in the penitentiary) is, under all the facts of the case, much less than the jury might have been justified in imposing. Defendant not only sought an undue and cowardly advantage by arming himself with, and using, his pistol, but after his antagonist had been shot, and had retreated to a distance which placed defendant beyond reach of danger from the butcher-knife with which he was armed, defendant twice reloads his pistol, and twice again fires upon him.

The judgment of the lower court is affirmed.

Affirmed.

BRISCO V. STATE.

(4 Tex. Ct. App. 219.)

Criminal law — larceny — “gelding.”

A ridgling (i. e. a half-castrated horse) is not a “gelding,” within a statute providing against the theft of “any horse, gelding, mare, colt, ass, or mule,” and an indictment charging the theft of a “gelding” is not supported by proof that the animal was a ridgling, but had the appearance of, and was generally believed to be, a gelding.

CONVICTION of theft. The opinion states the case.

E. R. Kone, for appellant.

George McCormick, assistant attorney-general, for the State.

WHITE, J. Appellant was indicted for theft of a gelding. The proof with regard to the sexual character and condition of the animal stolen is as follows: The alleged owner says: “He was a gelding. * * * What I mean by the word ‘gelding’ is a horse with one stone. The horse would run after mares; that is the reason one of his eyes was knocked out. * * * He was a horse, and not a mare. * * * Sometimes I could see it down, and sometimes it was in his belly.”

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The next witness says he got the horse from defendant. "I had him in my possession some ten or fifteen days before I traded him. I am satisfied that the animal was a horse, and not a mare. I took him to be a gelding." The testimony which this witness gave on the examining trial, in 1871, he said was correct, and that testimony is made part of his evidence. In it he says: "The horse had the sexual appearance of being a mare, and also the appearance of being a gelding."

The next witness says: "I took him to be a gelding."

The last witness who testified upon this subject says: "He was a gelding. I never examined him particularly to see if he was or not. I think he was a gelding."

Upon this point the court charged the jury as follows:

"A gelding is a horse that has been castrated, and is thus distinguished from the horse in his natural and unaltered condition. The indictment alleges the theft of a gelding, and proof of theft of a horse would not sustain the indictment. But proof that the animal was castrated so as to present the appearance of a gelding, so as to be taken, accepted, and believed to be a gelding, though in fact the castration was not complete, would be sufficient proof of the allegation in the indictment that the animal was a gelding."

This charge is assigned as error, both in the motion for a new trial and in the assignment of errors.

In our opinion the evidence showed the animal to be what is commonly known and called a "ridgling." A "ridgling," as defined by Mr. Webster, "is an animal half castrated; a male of any beast half-gelt." The word is also one in common use, and its meaning is as well known as the meaning of the word "stallion," or any other intended to describe the sex or physical condition of an animal. The same learned lexicographer defines "gelding" to mean a "eunuch" or "castrated animal," and the word "gelt" means the same thing.

It has frequently been held by our Supreme Court that an indictment for stealing a "horse," which, under our statute (Pasc. Dig. art. 2409), means an unaltered horse or stallion, will not be sustained by proof of theft of a mare or gelding, and *vice versa*. *Jordt v. The State*, 21 Tex. 571; *Swindel v. The State*, 32 id. 102; *Pigg v. The State*, 43 id. 108; *Keese v. The State*, 1 Tex. Ct. App. 298; *Banks v. The State*, 25 Tex. 647; *Lunsford v. The State*, 1 Tex. Ct. App. 448.

As was said in *Banks v. The State*, 28 Tex. 647, which is the leading case upon this subject, "the statute (art. 2409) itself, in creating and providing for the punishment of the offense, appears to fix its own meaning to the words used. It specifically describes the different species of property, by the use of the words 'horse, gelding, mare, colt, ass, or mule,' evidently discriminating between them as different species of property, and as much between a horse and mare as between horse and ass or mule. The averments of the indictment must be equally specific, and the proof must correspond with the averment. This construction of similar statutes has been adopted in England. Whart. Cr. Law; Roscoe's Cr. Ev.; 2 East's P. C. 616; Leach, 123; 1 Moo. C. C. 24; Archb. Cr. Pl. & Pr. 399, and notes; 2 Russ. on Cr. 133. And the same rule, under like statutes, has been adopted in the United States, so far as we have been enabled to examine the authorities. *Hooker v. The State*, 4 Ohio, 349; *Turley v. The State*, 3 Humph. 324." The rule, however, it appears, is different in some of the States. Bishop's Stat. Cr., § 426. It is too well established in Texas, and the reasons for it appear to be too cogent, to admit of controversy.

The law being thus settled, we must recur to the original question of fact to determine this case. The question is—Is a "ridgling," or a "stallion" which is but half castrated, a "horse" or a "gelding," under our statute? We have been unable to find a single reported case presenting a similar question.

In the case of *Cole v. The State*, which has never been reported, and which was an appeal, in 1874, from Harrison county, from a judgment of conviction upon an indictment for theft of a horse, the statement of facts showed that "the animal had one testicle cut out; had only one remaining testicle or seed, and was called by the witness, a 'ridgling.'" The judge below charged the jury in that case: "You cannot find the defendant guilty if the evidence shows the animal stolen (if any was stolen) was a mare or gelding—that is, a castrated animal of the horse species." Upon appeal to the Galveston term, 1875, of our Supreme Court, from the judgment of conviction in that case, the Supreme Court affirmed the judgment without a written opinion, and we fully concur in the correctness of the judgment.

In the case we are considering, the charge of the court was erroneous, and was upon the weight of evidence. It makes the fact as to whether the animal stolen was a horse or a gelding de-

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pend upon the further fact that an attempt had been made to castrate him, and that his appearance was that of a castrated animal, when there was positive testimony, as we have seen, that he was not castrated, and that at times that fact was plainly perceptible. The charge of the court usurped and infringed upon the province of the jury, by depriving them of the right to determine for themselves, under the evidence, whether or not the animal was in fact a gelding, as averred in the indictment.

For this error in the charge of the court the judgment must be reversed and cause remanded.

Reversed and remanded.

PLUMMER V. STATE.

(4 Tex. Ct. App. 310.)

Criminal law — homicide — accidental killing of third person in lawful self-defense.

One who in lawful self-defense against another accidentally and unintentionally kills a third person is guilty of no crime.

CONVICTION of aggravated assault. The opinion states the case.

Shepard & Garrett, for appellant.

W. B. Dunham, for the State.

WINKLER, J. On the trial below the jury were instructed as follows:

“If the defendant went to the house of Smelser to arrest him, and Mr. Smelser resisted and fired at the defendant first, and thus gave defendant to believe that he was in danger of death or great bodily harm, then the defendant would be excused in defending himself, and to kill Mr. Smelser, if necessary to save his life; and in that event, if he shot Mrs. Smelser by accident or through mistake, then you would see that he did not intend to kill, and therefore could not have made the assault with intent to kill or murder Mrs. Smelser; and in that event, he could not be justly convicted of a higher grade of assault than aggravated assault.”

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We are of opinion that the latter portion of this charge was erroneous, and calculated to mislead the jury to the prejudice of the accused.

We take the law to be that if the jury believed that the defendant found himself in a condition where he would have been justified in taking the life of Smelser in order to save himself from death or the infliction of great bodily harm, and in so defending himself from such danger, he by mistake or accident shot Mrs. Smelser, then he would not only not be guilty of an assault with intent to murder Mrs. Smelser, but he would not be guilty of any offense whatever.

The charge, if a proper one under the evidence on a subsequent trial, should be so framed as to harmonize with the intimation given above. Further than this we fail to discover any material objection to the charge. If the proof shows such a condition of affairs as to justify the accused in taking life in his necessary self-defense, the emergency would excuse him from culpability, if in making such necessary defense, he should unintentionally, or by accident or mistake, injure another person.

For the error pointed out the judgment must be reversed and the case remanded.

Reversed and remanded.

DAVIDSON V. STATE.

(4 Tex. Ct. App. 545.)

Constitutional law — penalty for not stopping railroad trains a specified time at stations.

A statute, imposing a penalty on railway conductors for failing to cause their trains to stop five minutes at every way station, is constitutional.

THE opinion states the case.

E. P. Hill, for appellant, cited *The State v. Noyes*, 47 Me. 189.

George McCormick, assistant attorney-general, for the State.

WHITE, J. The information in this case was based upon the first section of an act entitled "An act to regulate the time that

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railroad passenger cars shall stop at way-stations" (Acts 1866, p. 93 [2 Pasc. Dig., art. 6532]), which is in these words: "From and after the establishment of any wayside station, or stations, by any railroad company in this State, it shall be the duty of the conductor, or other person in charge of any train of passenger cars upon such railroad, to stop his train at each and every such station not less than five minutes; and any such conductor, or other person, in charge of such passenger train, who shall, upon any occasion, pass any such station without stopping his train as aforesaid, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall for each and every offense be punished by a fine of not less than fifty dollars, and not more than one hundred dollars, or by imprisonment in the county jail for a term not exceeding thirty days, and may be proceeded against for such offense by information or indictment, in any county through which the road passes."

Having, as conductor upon the Galveston, Harrisburgh & San Antonio Railroad, been convicted under this statute, the appellant in this case presents the sole question of the constitutionality of the law.

It is contended that power to pass such laws is referable only to, and must be regulated and determined by, the police power of the State, and that the police power of the State extends to regulations looking only to public *safety* and not to public *convenience*.

In treating of the police power of the States, Mr. Cooley, in his celebrated work on Constitutional Limitations, says:

"The rights insured to private corporations by their charters, and the manner of their exercise, are subject to such new regulations as from time to time may be made by the State, with a view to the public protection, health, and safety, and in order to guard properly the rights of other individuals and corporations. * * * The limit to the exercise of the police power in these cases must be this: The regulations must have reference to the comfort, safety, or welfare of society; they must not conflict in any way with the provisions of the charter; and they must not, under the pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise." Cooley's Const. Lim. (3d ed.) 576, 577.

Again the same learned author says:

“The State may also regulate the grade of railways, and prescribe how and upon what grade railway tracks shall cross each other; and it may apportion the necessary expense of making the necessary crossings between the corporations owning the roads. And it may establish regulations requiring existing railways to ring the bell or blow the whistle of their engines immediately before passing highways at grade, or other places where their approach might be dangerous to travel. * * * And it cannot be doubted that there is ample power in the legislative department of the State to adopt all necessary legislation for the purpose of enforcing the obligations of railway companies, as carriers of persons and goods, to accommodate the public impartially, and to make every reasonable provision for carrying with safety and expedition.” Id. 580, 581.

In *Benson v. Mayor of New York*, 10 Barb. 245, it is said, in considering a ferry-right granted to a city: “Franchises of this description are partly of a private and partly of a public nature. So far as the accommodation of passengers is concerned, they are *publici juris*; so far as they require capital and produce revenue, they are *privati juris*. Certain duties and burdens are imposed upon the grantees, who are compensated therefor by the privilege of levying ferriage and security from spoliation, arising from the irrevocable nature of the grant. The State may legislate touching them so far as they are *publici juris*. Thus, laws may be passed to punish neglect or misconduct in conducting ferries, to secure the safety of passengers from danger and imposition.”

This police power of the State, which resides primarily and ultimately in the legislature, has also been held to extend to the right to require all railways to fence their roads on both sides, and also cattle-guards at all farm and road crossings. *Thorpe v. Rutland & Burlington R. Co.*, 27 Vt. 140. And so it has been held that “it may be extended to the supervision of the track, tending switches, running upon the time of other trains, running a road with a single track, using improper rails, not using proper precautions by way of safety beams, in case of the breaking of axle-trees, the number of brakemen on the train with reference to the number of cars, employing intemperate or incompetent engineers and servants, running beyond a given rate of speed, and a thousand similar things, some of which have been made the subject of legislation or judicial

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determination, and all of which may be." *Hegeman v. Western R. Co.*, 16 Barb. 353.

In this latter case it was further and well said: "There is also the general police power of the State by which persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the State; of the perfect right in the legislature to do which no question ever was, or upon acknowledged general principles can be, made, so far as natural persons are concerned. And it is certainly calculated to excite surprise and alarm that the right to do the same in regard to railways should be made a serious question."

In the case under consideration, viewed in the light of the authorities given, we are of opinion that the legislature, under the general police power of the State, had the right to so regulate the time of stoppage at wayside stations of passenger railroad trains, and that in the enactment of the act in question they have not transcended the legitimate scope of that power.

So believing, and further, that no error has been committed in the trial of the case in the court below, the judgment is affirmed.

Judgment affirmed.

BATTLE V. STATE.

(4 Tex. Ct. App. 585.)

Criminal law — indictment for rape — allegation of sex.

An indictment charging an attempt to commit a rape upon "Theresa Gaudaloupe," and referring to that person as "her," is good without alleging that person to be a woman.

CONVICTION of assault with intent to commit rape. The opinion states the case.

No brief for appellant.

George McCormick, assistant attorney-general, for the State.

WHITE, J. The appeal in this case is from a judgment of conviction for an assault with intent to commit rape. Pasc. Dig., art. 2156. "Rape is the carnal knowledge of a woman without her

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consent, obtained by force, threats, or fraud, or the carnal knowledge of a female under the age of ten years, with or without consent, and with or without the use of force, fraud, or threats." Pasc. Dig., art. 2184.

The main error relied on is the one presented in the second ground of the motion in arrest of judgment, as follows: "The indictment does not show or charge that the assault with intent to rape was committed upon the person of a woman or female."

As set out in the indictment in making the charge, the language used is, after the formal allegations, that the accused "did then and there unlawfully, willfully, and feloniously, in and upon the body of Theresa Gaudaloupe, make an assault; and the said Owen Battle did then and there, without the consent and against the will of her, the said Theresa Gaudaloupe, attempt by force her, the said Theresa Gaudaloupe, then and there to ravish and carnally know, with intent her, the said Theresa Gaudaloupe, willfully and feloniously to ravish and carnally know," etc.

It was not error for the court to overrule the motion in arrest of judgment. This identical question has been adjudicated in several of the State courts.

In the case of *The State v. Terry*, 4 Dev. & B. 152, it was decided that the word "her," used in an indictment for rape, disclosed with sufficient certainty that the person stated therein to have been ravished was a female. The same court, in another case where the indictment charged that the prisoner "did make an assault, and her, the said Mary Ann Taylor, then and there, violently and against her will, did ravish and carnally know," say: "From the language used, the court can and must see with certainty that Mary Ann Taylor is a female." *The State v. Farmer*, 4 Ired. 224.

In *Taylor's* case, where the indictment did not allege that Ellen Frances Davis, the party ravished, was "a female," the Court of Appeals of Virginia held the indictment good, and further, that "both of the names 'Ellen' and 'Frances' are names universally applied to females only, and the personal pronoun of the female gender, 'her,' is twice used in the indictment in relation to the person therein described as 'Ellen Frances Davis,' and there is not a word in the indictment tending to show that such person is not a female." 20 Gratt. 825.

An analogous question was involved in *Tracy v. The State*, 44 Tex. 9, and is thus disposed of by ROBERTS, C. J. He says: "In

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the statement of facts the defendant is spoken of as a man who kept a hotel and wore whiskers, and the party who was beaten, when spoken of as a witness, is called Nancy Sheppard, whose given name is usually that of a female, and when therein designated as the person beaten, is spoken of as 'she.' * * * The defendant has no right to complain that the court and jury took for granted from the evidence adduced, both affirmative and negative, and inferential, the existence of the facts which fully established that he was an adult male and she a female."

As was said by WRIGHT, C. J., in *The State v. Hussey*, 7 Iowa, 409: "While it would be better in such cases to charge expressly the sex, yet the omission of such averment will not vitiate, if the same thing appears from all that is stated by the pleader." And Mr. Bishop thus states the rule: "Although in point of law, the person against whom the wrongful act is committed must be a woman, the indictment need not state the sex by express averment." 2 Bishop's Cr. Proc. (2d ed.), § 952.

Using, as does the indictment in this case, the personal pronoun "her" as many as three times in connection with the name of the assaulted party, and the fact that her Christian name is "Theresa," which is a name generally borne by a female, we think the indictment sufficiently describes the injured party as a female, or woman.

No other question of importance requiring discussion is apparent from, or raised in, the record. The case was fairly tried upon the law and the evidence; and the evidence as it is presented to us being, in our opinion, sufficient to authorize the verdict and judgment, the judgment is affirmed.

Affirmed.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
INDIANA.

BOWEN v. SULLIVAN.

(63 Ind. 281.)

Lost property — rights of finder.

The plaintiff, while engaged as an employee in the defendant's paper mill, in assorting a bale of old papers which the defendant had bought for manufacture, found a number of bank notes, in a clean unmarked envelope, in a bale, and delivered them to the defendant, for the purpose of ascertaining if they were good, and upon his promise to return them. The defendant refusing to return them upon demand, *held*, that the plaintiff was entitled to recover their value from him. (*See note, p. 180.*)

ACTION to recover the value of bank notes. The opinion states the facts. The plaintiff had judgment.

J. Applegate, for appellants.

C. R. Pollard, for appellee.

PERKINS, J. Ellen Quinn, a minor, found two fifty-dollar bank bills on the premises of the appellants, and handed the same to them, requesting to be informed if they were genuine. Appellants retained the bills, declining to return them to the finder, on demand.

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The appellee, Catherine Sullivan, the guardian of said minor, instituted this suit to recover the value of said bills.

Issues were formed, and tried by a jury; verdict for the plaintiff; motion for a new trial overruled, and judgment on the verdict.

The pleadings, on which the cause was tried, were good on demurrer, but some of them might have been subject to a motion to make more certain. *Hart v. Crawford*, 41 id. 197; *Doman v. Bedunnah*, 57 id. 219; *Wilson v. Kelly*, 58 id. 586.

As bearing on this part of the case, we cite *Tancil v. Seaton*, 28 Gratt. (Va.) 601, where it is decided, that "the finder of a bank note, as against a bailee without reward, to whom he delivers it to be kept for such finder, has such a possessory interest in the note as entitles him to recover the same of the bailee, on his refusal to re-deliver it to the finder on request, and in the absence of any claim of the rightful owner made known by him to such bailee."

On the trial, the court, of its own motion, gave to the jury the following instructions, which were all that were given in the cause. They were given by the Hon. T. B. WARD, who presided at the trial of the cause as special judge.

"The first paragraph of the complaint is upon an account for money alleged to have been had and received by the defendants, of the plaintiff's ward, for the use of said ward.

"The second paragraph of the complaint is not before you.

"The third and fourth paragraphs allege, in substance, that the plaintiff's ward found two bank-notes, of the denomination and value of fifty dollars each, on the defendants' premises (in their paper-mill); that her said ward handed said notes to one of the defendants, to ascertain if they were genuine, and upon a promise that he would return them to her; that the defendants kept said notes and converted them to their own use; therefore she prays judgment, etc.

"The answer is in three paragraphs, the first of which is a general denial of the allegations of the first paragraph of the complaint.

"The second and third paragraphs of the answer aver, in substance, that the defendants are copartners, engaged in the manufacture of paper, in Carroll county; that for the purpose of their business, it is their custom to purchase rags of different colors and

CASES
IN THE
SUPREME COURT OF JUDICIAL
OF
INDIANA.

BOWEN V. SULLIVAN

(100 Ind. 281.)

Lost property—right

The plaintiff, while engaged as an employe in assorting a bale of old papers which the defendant found, found a number of bank notes, a bale, and delivered them to the defendant. If they were good, and upon his promise refusing to return them upon demand, he to recover their value from him. (See

ACTION to recover the value states the facts. The plaintiff

J. Applegate, for appellants.

C. R. Pollard, for appellee.

PERKINS, J. Killed by bills on the premises.

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was :

nts. In May, 1876, they were per, about half a mile from Sullivan, who was working for 76. I went to the paper-mill of 76. I was not in their employ. two. I found some money in the v, 1876, on Wednesday. Up to the employ of the defendants. I the floor, in a clean envelope, not minutes afterward I showed it to to Huchtenhouser to see if it was it to the defendant Abner T. Bowen. bills in the envelope. I found the from where the girls were assorting or other mark upon the envelope. I the floor. The next morning I asked von for the money, and told him he He did not give me the money, but rs, if I would be satisfied, which I re- if he had bought this money or lost it. money has never been returned to me. rst person I told about having found it. Bowen got this money for the purpose of I or not. He said it was genuine. I am

ation this witness further testified :

in the room of the paper-mill where they the purpose of manufacturing the same into was about 15 by 30 feet. There were five at the time in assorting. The old papers are are placed upon the floor, out open, and the and put in screens. The persons then engaged the papers were Sarah and Mary Alberts, Annie and Alma Sullivan. I asked Abner T. Bowen d. He said it was. I asked him for it. He nt the money belonged to me. I told him I he proper person came. I then asked him if ney or lost it. He said no. I meant by that, -ty. He said he did not. I told him

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qualities; that the said bank-notes were purchased with other rags, in Kansas, by the defendants, and are their property; that the plaintiff's ward took said bank-notes from their premises, without right, but afterward returned them to the defendants.

"The burden of proof is upon the plaintiff. In order to entitle her to recover, she must prove the material allegations of her complaint by a preponderance of the testimony; that is, by a fair weight of the testimony. The finder of lost property is the owner of it as against every person except the loser, or real owner. If you believe, from the evidence, that the plaintiff's ward found the said bank-notes in the defendant's paper-mill, and if you believe said bank-notes were lost property, you should find for the plaintiff. The primary question is, were the notes lost property? If they were, it can make no difference whether they were found upon the highway, in the defendant's paper-mill, or in their dwelling-house; the difference between the highway, the place of business or the dwelling-house (so far as this case is concerned), is a difference only as to the degree of privacy; the place of business is more private than the highway, and the dwelling-house is more private than the place of business.

"But if the bank-notes were lost property and the plaintiff's ward found them, it does not matter where she found them; they belong to her as against every person but the loser, or real owner. But if you believe, from the evidence, that, as alleged in the third and fourth paragraphs of the answer, the defendants had purchased said bank-notes as rags, then they were not lost property, and you should find for the defendants.

"As I have already said to you, the plaintiff must make out her case by a preponderance of the testimony. You cannot indulge in any presumption in her favor, but you have a right to draw natural inferences from all the facts proven; and, if you believe, from the evidence, that the said bank-notes were found by the plaintiff's ward among the rags or paper belonging to the defendants, in their mill, and that said bank-notes got there by accident, and were not placed there purposely by the person of whom the rags and papers were purchased by the defendants, and the defendants did not know they were among the rags when they made the purchase, then I instruct you that said bank-notes were lost property, and you should find for the plaintiff."

The evidence in the cause consisted of oral testimony.

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Ellen Quinn's testimony was as follows :

"I am acquainted with the defendants. In May, 1876, they were engaged in the manufacture of paper, about half a mile from Delphi. I am a half-sister of Anna Sullivan, who was working for the defendants in the spring of 1876. I went to the paper-mill of the defendants in the spring of 1876. I was not in their employ. My sister had been for a week or two. I found some money in the paper-mill of defendants, in May, 1876, on Wednesday. Up to that time I had never been in the employ of the defendants. I found the money in the mill, on the floor, in a clean envelope, not in a package. In about five minutes afterward I showed it to Charley McClane. He took it to Huchtenhouser to see if it was good, and Huchtenhouser took it to the defendant Abner T. Bowen. There were two fifty-dollar bills in the envelope. I found the envelope three or four feet from where the girls were assorting papers. There was no name or other mark upon the envelope. I threw the envelope back on the floor. The next morning I asked the defendant Abner T. Bowen for the money, and told him he promised to give it back. He did not give me the money, but offered to give me ten dollars, if I would be satisfied, which I refused to take. I asked him if he had bought this money or lost it. He said he had not. This money has never been returned to me. Charlie McClane was the first person I told about having found it. The defendant Abner T. Bowen got this money for the purpose of seeing whether it was good or not. He said it was genuine. I am sixteen years old."

And upon cross-examination this witness further testified :

"I found this money in the room of the paper-mill where they assorted old papers for the purpose of manufacturing the same into new paper. The room was about 15 by 30 feet. There were five persons engaged there at the time in assorting. The old papers are received in bales which are placed upon the floor, cut open, and the contents taken out and put in screens. The persons then engaged there in assorting the papers were Sarah and Mary Alberts, Annie McClane, Mattie Kist and Alma Sullivan. I asked Abner T. Bowen if the money was good. He said it was. I asked him for it. He asked me if I thought the money belonged to me. I told him I thought it did until the proper person came. I then asked him if he had bought the money or lost it. He said no. I meant by that, if he claimed it as his property. He said he did not. I told him

I would like to have it. He offered me ten dollars, and asked me if I would take that and be satisfied. I said I would not. The room where this money was found is the assorting room of the paper-mill, up-stairs. The envelope, in which it was, was nice, clean and new, and had no writing or mark upon it. There were papers scattered all over the floor when I found it. I don't think there was a space on the floor more than four inches square, not covered with old papers. I found this money about 3 o'clock in the afternoon, and when I picked it up was nearer to Annie McClane than any person else, and about three or four feet from her. There were three screens in this room and two persons working at each."

Abner T. Bowen, one of the defendants, and a witness for the defendants, testified as follows :

"Charlie and Huchtenhouser came to me together. Charlie said 'she wants the money back, even if it is not good.' Don't know that I said any thing to him about returning it. The next morning I saw Ellen Quinn in the machine room. She said, 'what about the money?' I said, 'it is good money; who do you think this money belongs to?' She said she supposed it belonged to me, but thought she needed it more than I did. I asked her what she would do about it. She said, just as I said. I then offered her ten dollars. She shrunk back and refused to take it. Said I ought to give her at least half of it; if she had lost one hundred dollars and any one had found it and brought it to her, she would have divided equally with them. She repeated several times that she needed it worse than I did. I said that had nothing to do with it. She said she ought to have thrown it in the papers, and it would have been ground up, and I never would have received any benefit of it. I said nothing about not having bought it. That is about what I said and would think about it. She said she found it in an envelope marked Kansas City. She was working for us that week and the week before, receiving wages for her labor. I never gave her any authority to take those bills from the place where they were found."

On cross-examination he further testified :

"If that money was found in a bale of papers, we had bought it and paid for it. Huchtenhouser kept the accounts with the girls in the assorting room, so I cannot certainly say whether Ellen was in our employ the day the money was found. I did not know that

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money was there. We did not get it by accident. I think it was purchased with old paper. I think Ellen was working for us the day the money was found. I think I have a memorandum of the day the money was found, but can't now tell the day nor the month. It was entered on our cash book the day it was found. At the time I got the money I did not intend to give it back."

The testimony of the two foregoing witnesses represents the conflict in the testimony in the case on the part of the plaintiff and defendants.

There was no evidence that the envelope containing the money had been accidentally or carelessly laid down or dropped in the paper-mill by a visitor at the mill, so that the cases of *McAvoy v. Medina*, 11 Allen, 548, and *Lawrence v. The State*, 1 Humph. 228, are not applicable in the case at bar.

There was no evidence that the envelope was purchased by special contract, including it and its contents, so that the case of *Merry v. Green*, 7 M. & W. 623, is not applicable.

Ever since the case of *Armory v. Delamirie*, 1 Strange, 505, in which a chimney-sweeper's boy, having found a jewel, left it with a goldsmith to ascertain what it was, was held entitled to recover it, the law has been steady and uniform that the finder of lost property has a right to retain it against all persons except the true owner. *Tancil v. Seaton*, 28 Gratt. 601 ; s. c., 26 Am. Rep. 380 ; *Lawrence v. Buck*, 62 Me. 275. And ordinarily the place of finding is immaterial. *Tatum v. Sharpless*, 6 Phila. 18, and cases cited.

The jury in the case now before this court might have found from the evidence that an envelope was picked up from the floor of the defendants' paper-mill by Ellen Quinn ; was opened by her and found to contain two fifty-dollar bills ; that the bills were taken by her and the envelope returned to the floor ; that the envelope was purchased by the defendants at the rate of two and one-half cents per pound, as waste paper, raw material, to be used in the manufacture of paper ; that neither the seller of the envelope nor the buyer of it knew that it contained the bills in question, and only sold and bought and paid for the envelope ; that the rightful owner of the money is still unknown. Had the notes or bills in question been lying upon the floor, uninclosed when found, the case would have fallen within most, if not all, the approved authorities.

The distinguishing feature of the case is, that the bills were found contained in an article of property which had been purchased

by and belonged to the defendants. Did that fact carry with it the property in the bills in question ?

The case more nearly in point than any other which has fallen under our observation is *Durfee v. Jones*, 11 R. I. 588 ; s. c., 23 Am. Rep. 528 ; decided July 21st, 1877. DUFEE, C. J.

“The facts in this case are briefly these : In April, 1874, the plaintiff bought an old safe and soon afterward instructed his agent to sell it again. The agent offered to sell it to the defendant for ten dollars, but the defendant refused to buy it. The agent then left it with the defendant, who was a blacksmith, at his shop for sale for ten dollars, authorizing him to keep his books in it until it was sold or reclaimed. The safe was old fashioned, of sheet iron, about three feet square, having a few pigeon-holes and a place for books, and back of the place for books a large crack in the lining. The defendant, shortly after the safe was left, upon examining it, found secreted between the sheet-iron exterior and the wooden lining a roll of bills amounting to \$165.00, of the denomination of the National bank-bills which have been current for the last ten or twelve years. Neither the plaintiff nor the defendant knew the money was there before it was found. The owner of the money is still unknown. The defendant informed the plaintiff's agent that he had found it, and offered it to him for the plaintiff ; but the agent declined it, stating that it did not belong to either himself or the plaintiff, and advised the defendant to deposit it where it would be drawing interest until the rightful owner appeared. The plaintiff was then out of the city. Upon his return, being informed of the finding, he immediately called on the defendant and asked for the money, but the defendant refused to give it to him. He then, after taking advice, demanded the return of the safe and its contents, precisely as they existed when placed in the defendant's hands. The defendant promptly gave up the safe, but retained the money. The plaintiff brings this action to recover it or its equivalent.”

The court held, that as the purchase was of the safe, not the safe and its contents, the money was not embraced in the purchase.

“The plaintiff” (say the court) “claims that he is entitled to have the money by the right of prior possession. But the plaintiff never had any possession of the money, except unwittingly, by having possession of the safe which contained it. Such possession, if possession it can be called, does not of itself confer a right

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The case at bar is in this view like *Bridges v. Hawkesworth*, * * 7 Eng. L. & Eq. 424. In that case, the plaintiff, while in the defendant's shop on business, picked from the floor a parcel containing bank-notes. He gave them to the defendant for the owner if he could be found. The owner could not be found, and it was held that the plaintiff as finder was entitled to them, as against the defendant as owner of the shop in which they were found. 'The notes,' said the court, 'never were in the custody of the defendant nor within the protection of his house, before they were found, as they would have been if they had been intentionally deposited there.' The same in effect may be said of the notes in the case at bar; for though they were originally deposited in the safe by design, they were not so deposited in the safe, after it became the plaintiff's safe, so as to be in the protection of the safe as his safe, or so as to affect him with any responsibility for them. The case at bar is also in this respect like *Tatum v. Sharpless*, 6 Phila. 18. There it was held, that a conductor who had found money which had been lost in a railroad car was entitled to it as against the railroad company."

It is also claimed in this case, that the finding of the money was a wrongful act, and that therefore the defendants (appellants) have a right to hold the money. We do not concur in this view. The defendants insist that Ellen Quinn, the finder, was in their employ as a rag-sorter, and that therefore what she found while so in their employ belonged to them.

The evidence would have sustained such a finding; and in support of the verdict, perhaps we should presume in favor of it. If she was so in the defendants' employ, the finding of the money was not wrongful. In the elaborate case of *Brandon v. Planters and Merchants' Bank of Huntsville*, 1 Stewart, 320, it was held that lost property found by a slave belonged to his master, but we have found no case to which this doctrine has been applied as between employer and employee. See *Tatum v. Sharpless*, and *Durfee v. Jones*, *supra*.

See, on this general subject, note to *Bailey v. The State*, 21 Am. Rep. 187; *Bailey v. The State*, 52 Ind. 462; *The N. Y. & Harlem R. R. Co. v. Haws*, 56 N. Y. 175.

An objection was made to the admission of certain testimony, but it was not noticed in the brief of counsel in this court, and is therefore treated as waived.

The defendants, by counsel, object to some part of an instruction. But the instructions are not numbered ; and we cannot find one that is subject to the objection made. No instruction was asked by the defendants to supply any deficiency ; and as applicable to the evidence, we think the instructions were not liable to the defendants' objection.

It is claimed that the appellants, in purchasing the envelope containing the bills by weight, purchased the bank bills in question. Their existence was unknown when the envelope was purchased, and their weight was so infinitesimally small, compared with their value, that we do not concur in this proposition. It is unreasonable.

The judgment is affirmed, with costs.

Judgment affirmed.

NOTE BY THE REPORTER. — For a statement of *New York & Harlem R. R. Co. v. Haws*, cited in the principal case, see note, 23 Am. Rep. 581. In *Lawrence v. Buck*, 62 Me. 275, cited in the principal case, the action was replevin for a chain cable found in a river. When the plaintiffs discovered it the chain lay coiled up in a little pile near a place which is dry when the dam is out, as it then was, the end of the cable running off toward the dam, in water about a foot or eighteen inches deep. They hauled out about sixty feet of the chain upon some logs that were grounded and out of water there, the end being fast underwater. As it was then growing dark they left for the night, and when they returned for it the next morning it had been removed by the defendants, who claimed that they found the chain and coiled it up in the manner before described, having dragged it into shoal water for that purpose, and unfastened the end that was round a cedar buoy in the dam, several days before the plaintiffs saw it: that while the defendants were trying to remove the gravel in which a portion of the chain was imbedded, they were called away to their work on the railroad bridge. Soon after they borrowed a rope and blocks at the railroad shop and went to draw out the chain. They found that in the meantime somebody had taken out of the water the end they had coiled up, and drawn it out upon the logs. The defendants attached their tackle, drew out the chain and carried it to the railroad shop, where it was when replevied. *Held*, that the defendants were entitled to it.

In *Lawrence v. The State*, 1 Humph. 228 (1839), the court said : "The loss of goods in legal and common intentment depends upon something more than the knowledge or ignorance, the memory or want of memory of the owner as to their locality at any given moment. If I place my watch or pocket-book under my pillow in a bed-chamber, I may leave them behind me; but if that is all, I cannot be said with propriety to have lost them. To lose is not to place any thing carefully and voluntarily in the place you intend and then forget it; it is casually and involuntarily to part from the possession; and the thing is then usually found in a place or under circumstances to prove to the finder that the owner's will was not employed in placing it there." In that case a customer in a barber's shop had placed his pocket-book upon a table therein, and his attention being attracted by a fight in the street, he had gone out of the shop forgetting the pocket-book, which the barber afterward picked up and appropriated, it was held by the court that the pocket-book had not been lost, and therefore, that the act of the barber in appropriating it was not finding, but felonious taking. Somewhat similar in principle to this case was *McAvery v. Medina*, 11 Allen, 548 (1866), where the plaintiff picked up a pocket-book in a barber's shop and handed it to the barber to keep for the true owner. The true owner did not appear and the plaintiff sued the barber for the book. In the opinion of the court it is said : "This property is not under the circumstances to be treated as lost property in that sense in

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which the finder has a valid claim to hold the same until called for by the true owner. The property was voluntarily placed upon a table in the defendant's shop by a customer of his, who accidentally left the same there and has never called for it. The plaintiff also came there as a customer, and first saw the same and took it up from the table. The plaintiff did not by this acquire the right to take the property from the shop, but it was rather the duty of the defendant owner to use reasonable care for the safe-keeping of the same until the owner should call for it." The court then distinguished the case from *Bridges v. Hawksworth*, 15 Jur. 1079, 21 L. J. Q. B. 73, and remarked on its resemblance to *Lawrence v. The State*. In *Kincaid v. Eaton*, 98 Mass. 130 (1867), the same doctrine was held, although in that case the owner of the property had himself considered it so far lost that he had advertised a reward for its recovery. The property in question, again a pocket-book, was picked up from a desk in a banking-house, where the owner had left it accidentally, on going out of the bank, by a boy who shortly after came into the bank on an errand. Led by the advertisement the boy took the pocket-book to the owner, who, while giving him a gratuity, refused to pay the reward offered; an action being brought therefor, the court gave judgment for the defendant, on the ground that the reward was offered for the recovery of lost property, and that as the pocket-book was not, legally speaking, lost, the reward was not earned. Somewhat similar to *Lawrence v. Buck* was *Clark v. Maloney*, 8 Harr. 68, where a man found logs afloat and moored them, but they again broke loose and floated away, and were found by another; it was held that the first finder retained the rights which sprung from his having taken possession, and that he could maintain trover against the second finder, who refused to give them up.

I. *Ellery v. Cunningham*, 1 Metc. 113 (1840), where the mate of a vessel had found floating two bales of cotton in port, it was contended by counsel for the owners of the vessel (citing Bacon's Abr., tit. *Master and Servant*, Reeve's Domestic Relations, 343, and 1 Com. on Contracts), that the bales having been found by a servant belonged to his masters, the vessel owners, and, therefore, that there was no consideration for a promise by the owners who had received the cotton from the mate to account for it to him if they could not find the owners. SHAW, C. J., did not notice the argument drawn from the relation of master and servant, but held that there was sufficient consideration for the promise in the surrender of the cotton, the mate having acquired a special property therein. In *Mathews v. Harsell*, 1 E. D. Smith, 808 (1852), a servant who had found bank notes in her employer's house was allowed to maintain an action for them against a third person; but there the employer assented to the action, so that his rights were not passed upon. The same point was raised in *Tatum v. Sharpless*, 6 Phila. 18, and there rested on the responsibility of the master for his servant's actions; but BROWN, J., said: "It was suggested that the relation between the plaintiff and the company was that of master and servant, and that probably, should the parcel found be surrendered by the company to the plaintiff, the true owner, should he appear and prove his property, might compel its delivery or damages for withholding it. If the law would sustain such a demand, there would be very firm ground for the defendant to stand upon; no authority of the kind was referred to on the argument, and I have not been able to meet any."

The case of *Durfee v. Jones*, cited in the principal case, was thus criticised by a writer in the *American Law Review*: "The writer ventures to think this decision wrong. Nor would his opinion be changed by assuming, what the report does not make perfectly clear, that the defendant received the safe as bailee, and not as servant or agent, and that his permission to use the safe was general. The argument of the court goes on the plaintiff's not being a finder. The question is whether he need be. It is hard to believe that if the defendant had stolen the bills from the safe while it was in the owner's hands, the property could not have been laid in the safe owner (*R. v. Rowe*, Bell's C. C. 93), or that the latter could not have maintained trover for them if converted under those circumstances. Sir James Stephen (Crim. Law, art. 281, Ill. 4) seems to have drawn a similar conclusion from *Cartwright v. Green* and *Merry v. Green*, 8 Ves. 405; 7 M. & W. 623; but it is believed that no warrant for it can be found in the cases, and still less for the reason suggested (a reason drawn from Savigny, but not fitted to the English law). It will be understood, however, that *Durfee v. Jones* is

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perfectly consistent with the writer's view of the general nature of the necessary intent, and that it only touches the subordinate question whether the intent to exclude must be directed to the specific thing, or may be even unconsciously included in a larger intent, as the writer is inclined to believe."

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(63 Ind. 291.)

Constitutional law — uniformity of taxation — tax for education.

A statute provided that persons residing outside of a city or town, and electing to be transferred to such city or town for educational purposes, or who should send their children to a school in such city or town, should be liable to taxation on their property in such city or town as if they resided therein. *Held*, constitutional as to persons so sending their children to school, without making such election to be transferred.

SUIT to enjoin collection of a tax. The opinion states the facts. Judgment for defendant below.

R. S. Dwiggin, Z. Dwiggin and J. T. Sanderson, for appellant.

BIDDLE, J. Complaint by the appellant, against the appellees, to enjoin the collection of a special, additional tax, levied under the authority of section 3 of the act of March 8th, 1873, Acts 1873, p. 60, upon certain lands owned by the appellant and situated outside of the corporate limits, for the purpose of paying the interest and principal on certain bonds issued by said town of Kentland to aid in the erection of school buildings.

Some interlocutory orders were had in the premises, which we need not notice, as no question arises upon them. Answer, general denial; trial by the court on an agreed statement of facts, as follows:

"1. The plaintiff resides in Jefferson township, in said Newton county, Indiana, and outside of the corporate limits of the town of Kentland, which said town is situated in said Jefferson township.

"2. The real estate described in plaintiff's complaint is situated in said township, and outside of the corporate limits of the town of Kentland.

"3. The lands described in the complaint were of the assessed value of one hundred and fifteen thousand two hundred and twenty

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dollars (\$115,120) for the year 1874, as appears by the duplicate of said town.

"4. The plaintiff sent his children to the school in the school building in said town during the year 1874, for the payment of the erection and furnishing of which the bonds of said town had been issued, as alleged in the complaint; but said plaintiff was not transferred to said town for educational purposes; neither did said plaintiff make any request to be so transferred.

"5. That the defendants, Charles Frankenberger, John G. Perry and Greenberry W. McCray, as the board of trustees of said town, on the 12th day of May, 1874, levied a tax of fifty cents on each one hundred dollars of the valuation of said lands, as the taxes thereon, for the purpose of paying the principal and interest of said bonds so issued, amounting to the sum of \$576.10 for said year 1874, and for no other purpose whatever.

"6. That the defendant Daniel Graves, as the then marshal of said town, advertised said land for sale, as alleged in the complaint, to pay the above sum of \$576.10, delinquent taxes thereon for the year 1874, and the further sum of \$92.17, interest and penalty thereon, being the total sum of \$668.27, which remains due and unpaid."

Upon this agreed statement of facts, the court found for the appellees, and denied the injunction. Judgment accordingly.

The plaintiff below prepared the case and appealed from the judgment to this court.

The main question presented — indeed the only one discussed in the appellant's brief — is the constitutionality of the law under which the tax is sought to be collected. The Constitution requires that "The general assembly shall provide by law for a uniform and equal rate of assessment and taxation." Art. 10, § 1.

It is contended by the appellant, that the law in question does not provide a "uniform and equal rate of assessment and taxation."

The law under which the tax is assessed, cited above, provides, that "persons residing outside of any such city or town and electing to be transferred to such town or city for educational purposes, or who shall send their children to the school taught in any such building, shall, with their property, be liable to such tax as if they resided in such city or town, on all property owned by said person in the township where such city or town is located."

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said John Sinclair was run over and killed; that by an ordinance of said city, no train of cars was allowed to be run through that city at a greater rate of speed than six miles an hour; that by the same ordinance, it was provided that a watchman should be kept at the said crossing of said railway and said avenue to protect persons passing along said avenue and over said railway track from danger that might result from passing trains; that the defendant had notice of the passage of said ordinance, but had failed to comply with the same.

A demurrer to each paragraph of the complaint was overruled, and the defendant answered in general denial.

The jury trying the cause returned a verdict in favor of the plaintiff, assessing his damages at one thousand dollars, and with the overruling of a motion for a new trial, judgment followed upon the verdict.

No question is made in the argument here, as to the sufficiency of the complaint. We therefore assume that the demurrer to it was correctly overruled.

All the questions which we are required to consider are such as have arisen out of the causes assigned for a new trial by the defendant after the verdict, and relate principally and almost exclusively to the sufficiency of the evidence to sustain the verdict. We may say, generally, that it was made to appear by the evidence, that when the alleged injury sued for was inflicted, Fairfield avenue was a public street in the city of Fort Wayne, of considerable importance, running from north to south, and used as such by the public in passing and repassing over the same; that the track of the Pittsburgh, Fort Wayne and Chicago Railway, running from east to west, crossed said avenue at right angles, where there were but few houses in the immediate vicinity; that the said railway track also crossed Broadway avenue, several hundred feet west of where it crossed Fairfield avenue; that with the exception of some apple trees standing near Broadway avenue and the railway, there was an open area between Fairfield avenue and Broadway, south of the railway, extending south perhaps near, if not quite, two hundred feet; that certain railway shops, known as the Wabash shops, were located a short distance from, and immediately south-east of, the crossing of Fairfield avenue; that John Sinclair, the decedent, for whose death this suit was prosecuted, was an old man, one hundred and two years old, and resided with the plaintiff, who was his son,

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in Fort Wayne, on the north side of the railway so run and operated by the defendant ; that the plaintiff was at the time employed in the Wabash shops, and for that reason, and possibly for others, the decedent was in the habit of frequently crossing and recrossing said railway track, at its junction with Fairfield avenue ; that he was a remarkably active, sprightly and well-preserved man for one of his age, usually walking erectly and briskly, and in full possession of both the senses of hearing and seeing ; that on the 29th day of October, 1873, the decedent, at near two o'clock, and at about the time one of the defendant's trains was due from the west, was on the south side of the railway track, and at some distance from it, and becoming seemingly desirous of crossing back to the north side, on which he resided, started immediately in a northern direction along Fairfield avenue toward the track ; that about the time the decedent was first seen walking in the direction of the track, the train then due from the west then came in sight ; that the engineer, while somewhere in the vicinity of Broadway avenue, probably one hundred and fifty feet west of the crossing, saw the decedent approaching the track, without apparently observing the train, and caused the locomotive to give several sharp, quick whistles, indicative of danger, but the decedent, seeming not either to see or to hear the train, except as may have been indicated by a hastened movement, stepped on the track immediately in front of the locomotive, by which he was thrown with great force against an adjacent telegraph pole and almost instantly killed.

The witnesses differed as to whether the bell was rung before reaching the crossing, and there was a sharp and material conflict in the evidence as to the rate of speed at which the train was running when the collision with the decedent occurred.

We think the evident inference from the evidence is, that the decedent did not exercise due care in attempting to cross the railway track, as he did when he went upon it, and that he therefore negligently contributed to the injury which resulted in his death. It is not insisted by the appellee that the evidence justifies us in concluding that the decedent was without fault on his part. *The Terre Haute, etc., R. R. Co. v. Graham*, 46 Ind. 239 ; *The St. Louis, etc., R. W. Co. v. Mathias*, 50 Ind. 65.

We need not for that reason further and more particularly refer to the evidence tending to establish the want of ordinary prudence and care on the part of the decedent. Waiving all discussion as to

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whether or not the decedent was guilty of contributory negligence, the appellee contends that it was shown upon the trial by at least a fair preponderance of the evidence, that when the train struck the decedent it was running at a rate of speed which under the circumstances amounted to such gross negligence and to such a willful disregard of the public safety, and even human life itself, as to authorize a recovery by the appellee, under the second paragraph of the complaint, notwithstanding there may have been contributory negligence on the part of the deceased.

Those portions of the evidence which tended to show that at the time of the accident the train was running at a high and dangerous rate of speed, and that the decedent was struck with great force, are brought specially to our attention as sustaining that view of the evidence, but the conclusion at which we have arrived concerning the nature of the averments in the second paragraph of the complaint renders it unnecessary that we shall review that branch of the evidence.

There is a manifest want of uniformity in the authorities in their attempts to define the precise circumstances under which a plaintiff may recover for an injury, when it is shown that he, by his negligence, contributed to the injury for which he sues, and it is to be regretted that this want of uniformity pervades some of the cases heretofore decided by this court, but we think many of the apparent differences which have arisen on this subject result more from an inapt use of words and phrases than from any difference in the ideas intended to be expressed. There has been of late a very strong tendency of judicial opinion, adverse to the distinction between gross negligence and ordinary negligence, in the sense in which those terms are used in the class of cases to which we have above referred, and with that tendency the doctrine has been gaining ground in this, and at least some of the other States, that something more than mere negligence, however gross, must be shown to enable a party to recover for an injury when he has been guilty of contributory negligence; that in such a case something more aggressive than mere negligence must be alleged and proved. Strictly speaking, negligence is a non-feasance, not a malfeasance. It is an act of omission rather than commission. In its secondary meaning it may be said to include every omission to perform a duty imposed by law for the avoidance of injury to person and property. Where an intention to commit the injury exists, whether that

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intention be actual or constructive only, the wrongful act ceases to be a merely negligent injury, and becomes one of violence or aggression. Shearman & Redfield on Negligence, § 2; Whart. on Negligence, § 22, *et seq.*; *The Ohio, etc., R. W. Co. v. Selby*, 47 Ind. 471; *Railroad Co. v. Lockwood*, 17 Wall. 357.

When, therefore, the injury complained of is a negligent one merely, contributory negligence is a good defense to the action. It is only when the injury sued for is alleged, either in terms or substance, to have been willfully or purposely committed, that contributory negligence ceases to be a defense. By contributory negligence in this connection we of course mean such negligence as has materially or substantially contributed to bring about the injury set up in the complaint. As a matter of evidence, proof that the misconduct of the defendant was such as to evince an utter disregard of consequences, so as to imply a willingness to inflict the injury complained of, may tend to establish willfulness on the part of the defendant; but to authorize a recovery on such evidence there must be suitable allegations in the complaint to which it is applicable. The case of *The Cincinnati & Martinsville Railroad Co. v. Eaton*, 53 Ind. 307, fully sustains the views we have enunciated in this opinion.

Tested by the rules above laid down, we have come to the conclusion that the second paragraph of the complaint in this case did not do more than charge a negligent killing of the decedent, and hence that its allegations were not sufficient to justify a recovery over proof of contributory negligence on the part of the deceased.

We are aware that there is a line of decisions establishing what is known as the English doctrine, to the effect that the plaintiff may recover, notwithstanding his own negligence exposed him to the risk of injury, if the defendant, after becoming aware of the plaintiff's danger, could, by the exercise of ordinary care and diligence, have avoided injuring him. *Radley v. The Directors L. & N. W. R. W. Co.*, 18 Eng. Rep., Moak's Notes, 37; Shearm. & Redf. on Negligence, § 36; Whart. on Negligence, § 388. But we do not feel justified in disturbing what has been long accepted in this State as the better doctrine after much discussion and consideration.

For the error of the court in overruling the appellant's motion for a new trial, the judgment must be reversed.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial and for further proceedings.

Petition for a rehearing overruled.

Reversed and remanded.

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NOTE BY THE REPORTER.—In *Shearman and Redfield on Negligence*, § 86, it is said: "It is now well settled that the plaintiff may recover, notwithstanding his own negligence exposed him to the risk of injury, if the defendant, after becoming aware of the plaintiff's danger, failed to use ordinary care to avoid injuring him." "The American cases in which a contrary doctrine is expressed will be found, upon analyzing them, to be cases in which the negligence of the defendant consisted merely in not foreseeing the negligence of the plaintiff; for which, as we have already shown, the defendant is not responsible." See *Brum v. Hannibal & St. J. R. Co.*, 50 Mo. 461; 11 Am. Rep. 420; *Austin v. N. J. St. Co.*, 43 N. Y. 75; 3 Am. Rep. 668; which sustain the above doctrine. In the latter case, however, the question seems strictly to have been simply one of remote or proximate negligence, the court saying: "It cannot be said in such a case that the plaintiff's negligence contributed to the injury. The negligence must be *proximate*, and not *remote*. It must be a negligence occurring at the time the accident happened."

In *Owen v. Hudson River R. R. Co.*, 2 Bosw. 374, it was held, that "as the plaintiff in the action is not allowed to recover, notwithstanding the clearest proof of the negligence of the defendant, when it is also proved that his own negligence directly contributed to the accident, so the defendant is not shielded from a recovery, when it appears that but for his own subsequent negligence the accident would not have occurred; that is, when it appears that his own negligence was the sole proximate cause." This case was affirmed, 35 N. Y. 516. This rule was in effect approved in *Button v. Hudson River R. R. Co.*, 18 N. Y. 256, by HARRIS, J., citing *Trow v. Vermont Cent. R. R. Co.*, 24 Vt. 487, *Kerwhacker v. Cleveland, etc., R. Co.*, 3 Ohio St. 172, and *Davies v. Mann*, 10 M. & W. 548, and *Dowell v. Steam Nav. Co.*, 5 Ell. & B. 185, who says: "I think the true rule in such case was laid down by the judge, who tried the case last cited, in his instructions to the jury. He told them that if there was negligence on the part of the plaintiff, as well as on the part of the defendant, which led to the collision, the plaintiff could not recover if the defendant could have avoided the accident by reasonable care and skill; and that even supposing there had been negligence on the part of the plaintiff's vessel, still if the steamer could by ordinary care and skill have avoided the collision, the defendant would have been answerable. The fact that a man was on the wrong side of the road does not necessarily constitute a defense in an action against another by whom he was run over; but if his being there was the immediate cause of the accident, it is a defense, even though the person by whom the injury was committed was himself at fault. One man cannot, by his own negligence, cast upon another the necessity of extraordinary care." "Where the negligence of the defendant is proximate and that of the plaintiff remote, the action may be sustained. The question then is, whether, conceding that the plaintiff was without fault, the defendant might by the exercise of reasonable care and prudence, at the time of the injury, have avoided it."

In *Sullivan v. Lewis*, 49 N. Y. 379, a case of collision between vessels, the court said: "The want of proper lights on the plaintiff's vessel is not a defense, if those in charge of the defendant's vessel knew the true state of the facts, and could, with reasonable care, have avoided the injury."

Kerwhacker v. C. C. & C. R. R. Co., 3 Ohio St. 172, was the case of cattle running at large, and, owing to the want of a fence, getting upon the defendant's railway and being killed by defendant's train, it not being unlawful in that State for cattle to run at large. The court said: "The mere fact, however, that one person is in the wrong does not in itself discharge another from the observance of due and proper care toward him, or the duty of so exercising his own rights as not to injure him unnecessarily. There have been numerous adjudications, both in England and in this country, where parties have been held responsible for their negligence, although the party injured was at the time of the occurrence culpable, and in some of the cases in the actual commission of a trespass." "Where the plaintiff, in the ordinary exercise of his own rights, allows his property to be in an exposed and hazardous position, and it becomes injured by the neglect of ordinary care and caution on the part of the defendant, he is entitled to reparation, for the reason that although by allowing his property to be exposed to danger, he took upon himself the risk of loss or injury by *mere accident*, he did not thereby discharge the defendant from the duty of observing ordinary care and prudence, or in other words, voluntarily incur the risk of injury by the negligence of another." *Aycock v. R. R. Co.*, 6 Jones' L. 321.

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was a similar case, similarly decided, but the point was not discussed by the court. To the same effect is *Baloom v. Dubuque and Sioux City Railroad Co.*, 21 Iowa, 102, and *Trow v. Vermont Central Railroad Co.*, 24 Vt. 487. The court here said: "On the other hand, when the negligence of the defendants is proximate, and that of the plaintiff remote, the action can then well be sustained, although the plaintiff is not entirely without fault. This seems to be now settled in England and in this country. So in this case, if the plaintiff were guilty of negligence, or even of positive wrong, in placing his horse in the road, the defendants were bound to the exercise of reasonable care and diligence in the use of their road and management of the engine and train, and if for want of that care the injury arose, they are liable." To the same effect in a like case is the decision in *Needham v. S. F. & S. J. R. Co.*, 37 Cal. 409, disapproving *Tonawanda Railroad Co. v. Munger*, 5 Den. 255.

In *Tonawanda Railroad Co. v. Munger*, 5 Den. 255, it was held that a railroad company is not liable for negligently running its engine upon domestic animals straying upon its track, provided it does not act wantonly or maliciously. The court said: "A man is under no obligation to be cautious and circumspect toward a wrong-doer. A horse straying in a field falls into a pit left open and unguarded; the owner of the animal cannot complain, for as to all trespassers the owner of the field had a right to leave the pit as he pleased, and they cannot impute negligence to him. But injuries inflicted by design are not thus to be excused." This doctrine was denied in *Needham v. S. F. & S. J. R. Co.*, 37 Cal. 412, the court saying: "The error of the New York courts lies in the fact that they ignore all distinction between cases where the negligence of the plaintiff is proximate and where it is remote, and in not limiting the rule which they announce to the former." It was also disapproved in *Isbell v. N. Y. & N. H. R. R. Co.*, 27 Conn. 404, the court saying it is "at variance, as we most fully believe, not only with our own law, but with the common law of England." But in the *Munger* case the court laid stress upon the fact that the act of allowing cattle to stray at large was *wrongful*; and in alluding to this case the court, in *Kerschacker v. C. C. & C. R. Co.*, 8 Ohio, 200, says: "But the decisions in those States all rest upon the ground that it is *unlawful* for the owners of domestic animals to allow them to be at large."

In *Wright v. Brown*, 4 Ind. 95, the owners of a steamboat were held liable for the loss of a flat boat insecurely fastened to the shore, and swamped by the running of the steamboat past it under a full head of steam, they being aware that the flat-boat was so fastened.

In *Brownell v. Flagler*, 5 Hill, 282, the plaintiff had carelessly allowed his lamb to escape into the highway, and the defendant passing with a flock of lambs, that lamb joined it, and was with the flock when it was sold by defendant, to defendant's knowledge. *Held*, that defendant was liable for the value of the lamb, although he did not sell it or receive any thing for it.

In *Inman v. Funk*, 7 B. Monr. 538, the defendant was held liable for a collision of his boat with the plaintiff's, although the latter was weak, and would not have been injured if it had been of ordinary strength.

In *Louisville and Nashville R. R. Co. v. Collins*, 2 Duvall, 114, it is said: "But had the appellee been guilty of negligence, nevertheless the injury might have been avoided by the proper care of the engineer, and is therefore attributable to his gross negligence. In such a case, both principle and preponderating authority seem to decide that such a remediable fault of the person injured should not exonerate the wrong-doer from legal liability for the damage, which, without gross negligence, he could have prevented, and was as much bound by law to prevent in that as he would have been in any other case." This was the case of an employee suing the master.

Macon & W. R. R. Co. v. Davis, 18 Ga. 679, was the case of the driver of a vehicle killed by defendant's train at a crossing. The court said: "We think that it ought to be left to the jury to say whether, notwithstanding the imprudence of the plaintiff's servant, the defendants could not, in the exercise of reasonable diligence, have prevented the collision."

In *East Tennessee & Georgia Railroad Co. v. St. John*, 5 Sneed, 524, the defendant railroad was held responsible for running over and killing a slave, eight years old, asleep on its track, visible a quarter of a mile distant, but who was mistaken for a coat of one of

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defendant's laborers, and consequently no warning was given and the speed of the train was not slackened. In this case it was the statutory duty of defendants to give a signal of warning and use means to stop the train in all cases to avoid killing or injuring stock, persons or property.

In *Morrissey v. Wiggins Ferry Co.*, 43 Mo. 380, the case of a minor drowned while crossing a river on defendant's boat, the judge charged that, "unless the jury believed that the accident and death resulted without any negligence or want of care on the part of Annie, which produced or contributed to produce such accident and death, then they should find for defendant." *Held* error. The court said: "The settled principle now is that it ought to be left to the jury to say whether, notwithstanding the imprudence of the injured person, the defendant could not, in the exercise of reasonable diligence, have prevented the catastrophe."

To the same effect is *Foster v. Holly*, 38 Ala. (N. S.) 76, where a skiff fastened in the middle of a harbor channel was run down by defendant's vessel. The court said: "We cannot say that the fault of so placing the skiff was a *proximate* cause of the injury. It may be regarded as a cause, but the connection between it and the result was not so *immediate* that it could properly be denominated the *proximate* cause."

In *Chicago, etc., R. R. Co. v. Triplett*, 38 Ill. 482, the decedent, who was deaf and did not look for the train, was killed at a crossing by defendant's train, the engineer seeing him but not sounding his whistle continuously, nor checking the speed of the train. *Held*, that the defendant was liable. This, however, proceeded upon the doctrine of comparative negligence. The same is true of *Chicago, etc., Railroad Co. v. Hogarth*, *id.* 370, where a wagon was stalled on the track at a crossing.

In *Baltimore and Ohio R. R. Co. v. State*, 33 Md. 542, the court instructed the jury: "2d. Even if the jury believe that the said Trainor was guilty of the want of ordinary care and prudence in walking on the track of the defendant, under the circumstances testified to before them, yet if the jury further find that if the agents of the defendants had used, in and about the running of the train that injured him, ordinary prudence and care in giving reasonable and usual signals of its approach, and in keeping a reasonable look-out, the said accident would not have occurred, then the plaintiff is entitled to recover, provided they find the other facts set out in the first instruction of the plaintiff." The court said: "The second prayer contains, substantially, the same legal proposition with the first, and the appellant's objection is substantially the same. It is argued that if the deceased walked on the track, and his walking on the track was want of ordinary care, and the accident would not have happened if he had not walked on the track, then such walking was the proximate cause of the accident, and the plaintiff cannot recover. This argument does not justly apply the rule in 29 Md. 421. By 'proximate cause' is intended an act which directly produced, or concurred directly in producing, the injury. By 'remote cause' is intended that which may have happened, and yet no injury have occurred, notwithstanding that no injury could have occurred if it had not happened. No man would ever have been killed on a railway if he had never gone on or near the track. But if a man does, imprudently and incautiously, go on a railroad track, and is killed or injured by a train of cars, the company is responsible, unless it has used reasonable care and caution to avert it, provided the circumstances were not such when the party went on the track as to threaten direct injury, and provided that being on the track he did nothing, positive or negative, to contribute to the immediate injury. Any attempt to make plainer the rule laid down in the case referred to, than it is made by the language of the judge who delivered the opinion, is more likely to obscure than to illustrate it."

In *Tanner's Executor v. Louisville & Nashville Railroad Co.*, 60 Ala. 621, the court said: "In most cases of railroad accidents the conduct, from which negligence is sought to be inferred, presents itself in at least two stages; first, in placing parties in a situation of peril; second, in employing or not the proper means to avert the impending danger. Diligence is required of both parties — the railroad employees and the person endangered — through all the stages; and the negligence of one party does not excuse the other from the employment of proper diligence until the danger be passed. If those in charge of a train, even in the rightful exercise of their skill and diligence, find a person dangerously exposed, although such exposure was brought about by the negligence of such person, the duty of diligence resting on the officers of the train is not in the least diminished on that account. In such case, although they will stand acquitted of all blame in the first stage of the peril,

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yet when the peril has become reasonably manifest, so as to create the presumption that it was comprehended, each party must again be diligent to prevent the catastrophe. If the person endangered be negligent at this crisis, and suffer injury, which proper care and diligence could have averted, the law affords him no redress. On the other hand, if employing proper care and diligence to escape the danger, to which his own previous negligence had contributed proximately to expose him, those in control of the train fail to apply proper skill and diligence to avoid the injury, when such skill and diligence, if promptly resorted to, might have prevented it, this is wanton or reckless negligence, for which the railroad will be held accountable. In such case the negligence of the person injured, which first placed him in jeopardy, becomes remotely contributory to the actual injury sustained, and is no bar to the suit. This rule, however, does not apply where the manifestation of the peril and the catastrophe are so close in point of time as to leave no room for preventive effort. As we understand the rule of contributory negligence, it has been modified substantially as we have indicated above."

In *Weymire v. Wolfe*, Iowa Supreme Court, December, 1879, an action by the administrator of Dunn for injuries caused by the defendant to him, whereby he lost his life, the court said: "Whether if Dunn had died solely from the use of the liquor, he would be deemed as having so far contributed to his death by his voluntary acts as to preclude a recovery, we need not determine. The petition states, and the evidence tended to show, that Dunn was expelled from the saloon at a late hour of the night, drunk and unconscious, and died by reason of exposure and cold. If it should be conceded that Dunn contributed to his death by drinking until he became drunk and unconscious, it would not follow that the plaintiff would not be entitled to recover. If a person lies down upon a railroad track in a state of helpless intoxication, the company will not be justified in running a train over him, if it can be avoided in the exercise of reasonable care, after the person is discovered in his exposed condition. If after that the company should be guilty of negligence, whereby the exposed person should be injured, the negligence of the company would be deemed the proximate cause of the injury. *Morris v. Chicago, etc., R. Co.*, 45 Iowa, 29. So if the defendant negligently subjected Dunn to exposure to his injury, knowing that he was unconscious or even helpless, the defendant cannot escape liability on account of Dunn's negligence prior to the wrongful acts whereby Dunn was subjected to exposure, however great Dunn's negligence may have been in allowing himself to become intoxicated."

In *Steele v. Burkhardt*, 104 Mass. 59, it was held that one who places his horse and wagon in a street in a city transversely to the course of the street, while loading articles which a city ordinance permits to be loaded only in vehicles placed lengthwise and as near as possible to the sidewalk, is not restrained by the mere fact of thus violating the ordinance from maintaining an action against one who injures the horse by negligently driving another wagon against it, when by exercising more care he might have avoided doing so. But it was here found as a fact that toward the defendant the plaintiffs were guilty of no negligence, but were careful to give him ample room to pass.

In *Marble v. Ross*, 124 Mass. 44, the defendant knowingly kept a vicious and dangerous stag in a large pasture, and the plaintiffs' intestate, while in the pasture, was attacked and injured by it. The defendant requested the court to rule that if the plaintiffs' intestate was a trespasser in the pasture they could not recover. A refusal so to rule was sustained, the court saying: "The mere fact that the intestate was upon the defendant's land without his consent would not defeat the right of action. The unlawful character of his act did not contribute to his injury or affect the defendant's negligence." Citing *Spofford v. Harlow*, 8 Allen, 176, where it was held that the fact that the plaintiff was driving on the left side of the road, in violation of a statute, would not prevent his recovering for an injury caused by the negligence of the defendant. *Steele v. Burkhardt*, *supra*; *Kearns v. Sowden*, 104 Mass. 68, note; *Davies v. Mann*, 10 M. & W. 546. The court further observed: "The fact, therefore, that the intestate was committing an unlawful act at the time of his injury would not prevent his recovery. Nor does the fact that this unlawful act was a trespass upon the defendant's land necessarily have this effect. It is true that, as a general rule, a trespasser who is injured by a pit or dangerous place upon the land of another, excavated or permitted

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for a lawful purpose, cannot recover damages therefor, because the owner of the land owes no duty to him, and therefore is not negligent as to him; but it is clear that the owner of land cannot wantonly injure a trespasser. If he does he is liable civilly as well as criminally. The law holds the keeper of an animal known to be dangerous, which injures another, to the same degree of responsibility as in cases of wanton injury, and the fact that the person injured is trespassing does not exonerate such owner from the consequences of his negligence. Suppose a child had entered the defendant's pasture for the purpose of picking berries or of crossing the pasture, and had been gored by the defendant's stag; he would have been a trespasser, but would he be, therefore, remediless? *Bird v. Holbrook*, 4 Bing. 628; *Loomis v. Terry*, 17 Wend. 496; *Meibus v. Dodge*, 38 Wis. 300; s. c., 20 Am. Rep. 6; *Hooker v. Miller*, 37 Iowa, 612; s. c., 18 Am. Rep. 18."

Loomis v. Terry, *supra*, was the case of a boy hunting on the defendant's lands without his consent, and bitten there by the defendant's dog. But in *Bush v. Brainard*, 1 Cow. 78, a recovery was denied for the loss of a cow running at large and killed by drinking maple syrup carelessly left in the defendant's uninclosed wood. This was put on the ground that the cow had no right there, but the better ground seems to be the defect of proof that it was the disposition of cows to drink maple syrup, or that maple syrup is injurious to them.

In *Butterfield v. Forrester*, 11 East, 60, ELLENBOROUGH, C. J., observed: "One person being in fault will not dispense with another person using ordinary care for himself. Two things must concur to support this action—an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." (But this rule, says REDFIELD, J., in *Robinson v. Cone*, 23 Vt. 221, has been questioned and criticised in later American and English cases.) That was the case of one riding fast on a horse through a public street, and receiving injury by running against an obstruction placed by defendant. But the observation above quoted was intended to apply on both sides, for his lordship also said: "In cases of persons riding upon what is considered the wrong side of the road, that would not authorize another purposely to ride up against them." Such is the interpretation put on it by PARKER, B., in *Davies v. Munn*, 10 M. & W. 549, where he says: "I am reported to have said in that case"—*Bridge v. Grand Junction Railway Co.*, 3 M. & W. 346—"and I believe quite correctly, that the rule of law is laid down with perfect correctness in *Butterfield v. Forrester*, that although there may have been negligence on the part of the plaintiff, yet unless he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong."

In *Davies v. Mann*, 10 M. & W. 546, the plaintiff illegally turned his donkey, fettered, into the highway, and the defendant's team of horses and wagon ran against it and injured it, their driver being some distance behind. "Were this not so," said PARKER B., "a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."

In *Tuff v. Warman*, 2 C. B. (N. S.) 740, a case of collision of vessels, the jury were instructed, that if the negligence or default of the plaintiff was in any degree the direct or proximate cause of the damage, he was not entitled to recover, however great might have been the negligence of the defendant; but that if the negligence of the defendant was only remotely connected with the accident, then the question was whether the defendant might by the exercise of ordinary care have avoided it. *Held*, a correct direction. This was affirmed in the Exchequer Chamber, 5 C. B. (N. S.) 573. The court said: "Mere negligence, or want of ordinary care or caution, would not, however, disentitle him to recover, unless it were such that but for that negligence or want of ordinary care or caution the misfortune could not have happened; nor if the defendant might by the exercise of care on his part have avoided the consequence of the neglect or carelessness of the plaintiff." To the same effect are the *nisi prius* cases of *Barrett v. Midland Railway Co.*, 1 F. & F. 861, and *Maisin v. Mitchell*, 9 C. & P. 613. The *nisi prius* case of *Luxford v. Large*, 5 C. & P. 421, before DENMAN, C. J., seems to hold the contrary.

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In *Greenland v. Chaplin*, 5 Ex. 243, the plaintiff, a passenger on a steamboat, was injured by the falling of an anchor, caused by the defendant's steamboat striking the other boat. It was held that he was entitled to recover in spite of the negligent stowage of the anchor, or in his negligence in placing himself where it would hit him. POLLOCK, C. B., said: "A person who is guilty of negligence, and thereby produces injury to another, has no right to say, 'Part of that mischief would not have arisen if you yourself had not been guilty of some negligence.' I think that where the negligence of the party did not in any degree contribute to the immediate cause of the accident, such negligence ought not to be set up as an answer to the action." Precisely to the same effect is *Catlin v. Hills*, 8 C. B. 123.

In *Morrison v. General Steam Nav. Co.*, 8 Ex. 733, it was held that where a vessel, through sheer negligence, injures another vessel by running her down at night, the mere fact that the injured vessel was at the time guilty of an infringement of the admiralty rules by not exhibiting a light, affords no justification when the absence of the light did not contribute to the accident. The circumstances in *Dowell v. Same Defendant*, 5 E. & B. 195, were similar, except that a light was displayed momentarily and then withdrawn. The judge instructed the jury that, supposing there was negligence on the part of the collier, still, if the steamer could, by ordinary care and skill, have avoided the collision, the defendant would be answerable. This was supported on the authority of "the donkey case." *Davies v. Mann*. The same doctrine is laid down in *Scott v. Dublin & Wicklow Railway Co.*, 11 Ir. C. L. 377.

In *Lynch v. Nurdin*, 1 Ad. & El. (N. S.) 29, the same doctrine was held where defendant negligently left his horse and cart unattended in a public street, and a child seven years old was injured by getting upon the cart. And in *Bird v. Holbrook*, 4 Bing. 628, the defendant was held liable to a trespasser for injury by a spring gun, placed on the land without notice. This is put on the ground that the act is deliberately done. But as DENMAN, C. J., said in *Lynch v. Nurdin*, "between willful mischief and gross negligence the boundary line is hard to trace; I should rather say impossible."

This question was set at rest in *Radley v. London and Northwestern Railway Co.*, 1 App. Cas. 754, in the House of Lords. The chief opinion was delivered by Lord PRIZANCE as follows:

"The remaining question is whether the learned judge properly directed the jury in point of law. The law in these cases of negligence is, as was said in the Court of Exchequer Chamber, perfectly well settled and beyond dispute.

"The first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident.

"But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him.

"This proposition, as one of law, cannot be questioned. It was decided in the case of *Davies v. Mann*, supported in that of *Tuff v. Warman* and other cases, and has been universally applied in cases of this character without question.

"The only point for consideration, therefore, is whether the learned judge properly presented it to the mind of the jury.

"It seems impossible to say that he did so. At the beginning of his summing up he laid down the following as the propositions of law which governed the case: It is for the plaintiff to satisfy you that this accident happened through the negligence of defendant's servants, and as between them and defendants that it was solely through the negligence of the defendant's servants. They must satisfy you that it was solely by the negligence of the defendant's servants, or, in other words that there was no negligence on the part of their servants contributing to the accident, so that if you think both sides were negligent so as to contribute to the accident, then the plaintiffs cannot recover.

"This language is perfectly plain and perfectly unqualified, and in case the jurors thought there was any contributory negligence on the part of the plaintiff's servants

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they could not, without disregarding the direction of the learned judge, have found in the plaintiff's favor, however negligent the defendants had been, or however easily they might with ordinary care have avoided any accident at all.

"The learned judge then went on to describe to the jury what it was that might properly be considered to constitute negligence, first in the conduct of the defendants, and then in the conduct of the plaintiffs; and having done this, he again reverted to the governing propositions of law, as follows: 'There seem to be two views. It is for you to say entirely as to both points. But the law is this, the plaintiff must have satisfied you that this happened by the negligence of the defendant's servants, and without any contributory negligence of their own; in other words, that it was solely by the negligence of the defendant's servants. If you think it was, then your verdict will be for the plaintiffs. If you think it was not solely by the negligence of the defendants' servants, your verdict must be for the defendants.'

"This, again, is entirely without qualification, and the undoubted meaning of it is, that if there was any contributory negligence on the part of the plaintiffs they could in no case recover. Such a statement of the law is contrary to the doctrine established in the case of *Davies v. Mann*, and the other cases above alluded to, and in no part of the summing up is that doctrine anywhere to be found. The learned counsel were unable to point out any passage addressed to it.

"It is true that in part of his summing up the learned judge pointed attention to the conduct of the engine-driver, in determining to force his way by violence through the obstruction, as fit to be considered by the jury on the question of negligence; but he failed to add, that if they thought the engine-driver might at this stage of the matter, by ordinary care, have avoided all accident, any previous negligence of the plaintiffs would not preclude them from recovering.

"In point of fact the evidence was strong to show that this was the immediate cause of the accident, and the jury might well think that ordinary care and diligence on the part of the engine-driver would, notwithstanding any previous negligence of the plaintiffs in leaving the loaded up truck on the line, have made the accident impossible.

"This substantial defect of the learned judge's charge is that that question was never put to the jury.

"On this point, therefore, I propose to move that your lordships should reverse the decision of the Exchequer Chamber and direct a new trial."

The duty of the railway company toward persons unlawfully on its track is thus pointed out in *Philadelphia and Reading Railroad Co. v. Spearman*, 47 Penn. St. 304: "If an adult should place himself upon the railroad, where he has no right to be, but where the company is entitled to a clear track, and the benefit of the presumption that it will not be obstructed, and should be run down, the company would be liable only for willful injury, or its counterpart, gross negligence. But if a child of tender years should do so and suffer injury, the company would be liable for the want of ordinary care. The principle may be illustrated thus: If the engineer saw the adult in time to stop his train, but the train being in full view, and nothing to indicate to him a want of consciousness of its approach, he would not be bound to stop his train. Having the right to a clear track, he would be entitled to the presumption that the trespasser would remove from it in time to avoid the danger; or if he thought the person did not notice the approaching train, it would be sufficient to whistle to attract his attention without stopping. But if instead of the adult it were a little child upon the track, it would be the duty of the engineer to stop his train upon seeing it. The change of circumstances from the possession of the capacity in the trespasser to avoid the danger to a want of it would create a corresponding change of duty in the engineer. In the former case, the adult concurring in the negligence causing the disaster is without remedy; in the latter, the child not concurring from a want of capacity, the want of ordinary care in the engineer would create liability. But if the train were upon the child before it could be seen, or if it suddenly and unexpectedly threw itself in the way of the engine, the engineer being incapable of exercising the measure of ordinary care to save it, the child would be without remedy, for the company's use of its track is lawful, and the presence of the child is unlawful."

Catlett v. Trustees of the M. E. Church of Sweetser Station.

In *Indianapolis v. Vincennes R. R. Co. v. McClaren*, 63 Ind. 568, the court say: "The railroad company may be liable for the willful acts of its employees (*The Jeffersonville R. R. Co. v. Rogers*, 38 Ind. 116); and their conduct in the management of the train, where injury results, may be given in evidence as tending to show that the injury was willfully and purposely inflicted. The only fact from which an inference that the injury in this case was so inflicted could have been drawn was, that the managers of the train did not stop it some little time before overtaking the deceased, and send hands enough to take him off the track, and hold him till the train passed.

"The question of law is, was such the duty of the railroad company? If it was, it was so because the presumption is that a person on a railroad track, in front of an approaching train, will not leave the track, but remain upon it and be killed, if such person is not forcibly removed from it. If such is the general presumption, then it may be the duty of a railroad train to come to a dead stop at a distance far enough from a person observed upon the track to enable it to send a force and remove him from the track before the train passes. This practice would necessarily render railroad transportation so slow as to lead to its abandonment, and a return to the old methods of transportation by muscular power, with the aid of wagons, etc., which vehicles may pass around and avoid obstructions in their path. We do not believe the general presumption is as above stated. We believe the presumption to be that a trespasser upon a railroad track, when he discovers a train approaching, will, from a care of his personal safety, if not from a sense of duty, leave the track before the train reaches him, and that the managers of trains may act upon that presumption."

CATLETT V. TRUSTEES OF THE M. E. CHURCH OF SWEETSER STATION.

(63 Ind. 365.)

Contract — Sunday — church subscription — ratification.

A church subscription made on Sunday is void, and is not made valid by a subsequent oral acknowledgment and promise to pay it, without consideration.*

SUIT on a subscription. The opinion states the facts. The plaintiffs had judgment below.

R. W. Bailey and A. Diltz, for appellant.

Van Devanter and J. W. Lacey, for appellees.

BIDDLE, J. Suit by the appellees against the appellant, on a written subscription to a church, payable to the appellees, for fifty dollars.

The action was commenced before a justice of the peace, and came to the Circuit Court by appeal. In the Circuit Court the appellant moved to reject the amended complaint. His motion was overruled and excepted to. Trial by the court, finding and judg-

* See *contra*, *Allen v. Duffy*, Michigan Supreme Court, February 11, 1880; 21 Alb. L. J. April 20, 1880.

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ment for appellees. The case is presented here upon two questions, the alleged error in overruling the motion to reject the amended complaint, and the alleged insufficiency of the evidence to sustain the finding.

The complaint is good. The practice in justices' courts does not require very skillful pleading; but the evidence is insufficient to maintain any action. It is admitted in the bill of exceptions, that the contract on the subscriptions was made on Sunday; but it is claimed that it was subsequently ratified by the appellant. There is evidence showing that the appellant admitted to third parties that he had made the subscription, and some evidence tending to show that he thus admitted he would pay it, but none except the subscription itself that he ever promised the appellees that he would pay it. And if he had made a direct promise to the appellees that he would pay the subscription, unless it was founded upon some consideration different from the subscription itself, the promise would be void.

As a general rule, void contracts cannot be ratified, but there seems to be an exception in favor of contracts void for having been made on Sunday, which may be ratified, upon a consideration that essentially makes a new contract; as when property, or something of value, has been obtained through the means of a contract made on Sunday, and a promise afterward made to pay for it. In such case keeping the property and making the promise constitute the new contract or ratification. But while the contract remains unexecuted, when nothing has passed between the parties, and they remain as they were at the time the contract was made, a mere promise to execute it will have no validity.

The evidence in the case before us shows that the parties remain as they were at the time the contract was made; the admission, therefore, or the direct promise of the appellant to pay the subscription, has no validity.

The following authorities establish these principles: *Banks v. Werts*, 13 Ind. 203; *Love v. Wells*, 25 id. 503; *Perkins v. Jones*, 26 id. 499; *Pate v. Wright*, 30 id. 476; *Heller v. Crawford*, 37 id. 279; *Davis v. Barger*, 57 id. 54.

[Omitting an unimportant point.]

The judgment is reversed, at the costs of the appellees, and the cause remanded, with directions to sustain the motion for a new trial, and for further proceedings.

Judgment reversed.

Hausman v. Nye.

HAUSMAN V. NYE.

(68 Ind. 485.)

Contract — law of place — delivery to carrier — statute of frauds.

An agent of a principal residing in Ohio contracted with a person residing in Indiana, to sell him goods exceeding \$50 in price. Nothing was said as to the manner of shipment. There was no memorandum, earnest money, nor payment, and the vendee did not receive any part of the goods. The principal afterward in Ohio, without the knowledge or assent of the vendee, shipped a part of the goods to the vendee, who refused to receive them. *Held*, that the contract was an Indiana contract; that it was an entire contract, and the vendee was not bound to accept part; that the delivery to the carrier under the circumstances was not a legal delivery to the vendee;* and that the contract was void under the statute of frauds.

ACTION for price of goods, wares, and merchandise. The opinion states the facts. The plaintiff had judgment.

J. T. Pierce, W. J. Mason, W. D. Bynum, D. V. Burns and H. Burns, for appellant.

PERKINS, J. Suit before a justice of the peace, upon the following bill of particulars :

MARIETTA, Ohio, *October 6th*, 1874.

Mr. Frank Hausman, Washington, Indiana, bought of A. T. Nye & Son, manufacturers of cook, parlor and heating stoves, etc. Terms ninety days.

2 No. 2 Omega stoves, \$10.....	\$20 00
2 No. 3 Omega stoves, \$15.....	30 00
2 No. 7 Aladdin and Ware, \$11.....	22 00
3 No. 8 Charm, \$5.50.....	16 50
Dray.....	50
	<hr/>
	\$89 00
Freight to Cin. 1,400 lbs., 20c. per cwt.	2 30
	<hr/>
	\$86 20

Hausman refused to accept the goods shipped. Judgment for the amount of the account before the justice. Appeal to the Circuit

*But see *Magruder v. Gage* (38 Md. 344), 3 Am. Rep. 177; also, see *Ketwert v. Meyer*, post.

Court. Trial by the court ; judgment for the appellees, plaintiffs below, for \$86.20. Motion for a new trial denied. The grounds specified in the motion were: 1. Finding of the court was not sustained by the evidence ; 2. Finding was contrary to law ; 3. Error of court in overruling a motion to strike out specified parts of a deposition ; 4. Refusing a new trial on newly-discovered evidence.

The contract in the case between the plaintiffs and the defendant embraced all the articles in the bill of particulars sued on, and others in addition. One of the plaintiffs in his testimony said: "I shipped the goods, as per Mr. Hausman's order, to Scott, with the exception of three No. 7 Charm heating stoves, which we could not, at that time, send, as they were not then on hand." The defendant, Hausman, in his testimony stated, that "He ordered other goods at the same time, viz.: Ordered three No. 7 Charm heating stoves, but they did not come. I ordered all these goods at one time, and would not have ordered part without the rest. I needed the stoves which did not come, in my business."

The contract was an entire contract for the whole of the bill of goods ordered, and the defendant, Hausman, was not obliged to accept the part shipped. *Smith v. Lewis*, 40 Ind. 98.

Again: The contract was void by the statute of frauds. It was an Indiana contract, made at Washington, in this State, between the defendant, Hausman, and Sanford W. Scott, agent of the plaintiffs, with full power to make the same a finality. *Keiwert v. Meyer*, *post*, p. 587.

Our statute reads thus: "No contract for the sale of any goods, for the price of fifty dollars or more, shall be valid, unless the purchaser shall receive part of such property, or shall give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain be made, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized." 1 R. S. 1876, 504, § 7.

In this case the contract was for the sale of goods for the price of over fifty dollars; no part of the property was received by the purchaser; no earnest was given to bind the bargain, or in part payment; and no note or memorandum, signed by the party to be charged or his lawfully authorized agent, was made.

It is claimed that there was a delivery and acceptance of the goods, under the contract. Scott, the agent of the plaintiff, testified touching the contract as follows: "In behalf of the plaintiff,

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some time in September, A. D. 1874, I sold to Mr. Frank Hausman two No. 2 Omega stoves, at ten dollars each; two No. 3 Omega stoves, at fifteen dollars each; two No. 7 Aladdin cook stoves with cast ware at eleven dollars each; three No. 7 Charm heating stoves, at four dollars and a half each, three No. 8 Charm heating stoves, at five dollars and a half each. The terms of sale were ninety days' credit. The freight was to be paid by the plaintiffs to Cincinnati, and the goods to be shipped at the defendant's risk." Hausman, the defendant, testified: "It was agreed, when I ordered the goods, that the plaintiffs should ship them from Marietta, Ohio, to Washington, Indiana, and that they should pay the freight to Cincinnati, Ohio, and I the rest of the way. Nothing was said by him or me about shipping goods at my risk." As to the manner of the shipment made of the goods, Mr. Nye, one of the plaintiffs, testified: "The plaintiffs delivered the goods in the said invoice described upon the wharf-boat of Hall & Best, steamboat agents and owners of the Marietta wharf-boat at Marietta, Ohio, marked and directed plainly to Frank Hausman, Washington, Daviess county, Indiana, consigned to the Ohio & Mississippi R. R., Cincinnati, Ohio. Bills of lading were taken, one of which was sent to Hausman."

Nothing was said between the parties, at the time of the contract or afterward, as to the manner or route or vessel, in or by which the goods were to be shipped, nor as to the carrier to whom they were to be delivered. The bill of lading signed by Hall & Best recited a shipment of goods by Nye & Son, "on board the good steamboat Chesapeake, to be delivered at the port in Cincinnati, unto the O. & M. R. R. Co., or assigns, they paying freight, etc., marked Frank Hausman, Washington, Daviess county, Indiana."

The contract, as we have said, was an Indiana contract, and void under the statute of frauds. It was not executed by what was done in Marietta, Ohio, claimed to have constituted a delivery and acceptance; or rather, as the statute requires, a reception, by the purchaser, of the goods or a part thereof:

1. Because the contract was entire, for the delivery of all the goods or none. The delivery of a part to a carrier, in the absence and without the knowledge of the vendee, could be no delivery, under and pursuant to the contract.

2. A delivery to a carrier not named by the vendee was not a delivery to the vendee.

“It was once held that a delivery to a common carrier, not selected by the purchaser, by the latter's direction, was not acceptance by the purchaser, within the statute. *Hart v. Sattley*, 3 Camp. 528. * * * But this case has not been followed in later cases.” *Spencer v. Hale*, 30 Vt. 314.

In *Rogers v. Phillips*, 40 N. Y. 519, it is decided, that “Upon a verbal contract for the sale of goods of more than fifty dollars in value, a delivery of them, in accordance with such contract, to a general carrier, not designated or selected by the buyer, does not constitute such a delivery and acceptance, under the statute of frauds, as to pass the title to the goods.” Although in the case of a contract, itself valid, such a delivery might be sufficient to transfer the title and risk to the purchaser. But it is not necessary that we should express an opinion upon this point. See *Strong v. Dodds*, 47 Vt. 348. Also, on the general subject, the elaborate case of *Bacon v. Eccles*, 43 Wis. 227; *Allard v. Greasert*, 61 N. Y. 1.

In *Lloyd v. Wright*, 25 Ga. 215, it is said in the opinion of the court: “Under the proof, was this case within the 17th section of the statute of frauds? The statute requires that the purchaser shall ‘actually receive’ the goods. And although goods are forwarded to him by a carrier by his direction, or delivered abroad on board of a ship chartered by him, still there is no actual acceptance to satisfy the act, so long as the buyer continues to have the right, either to object to the *quantum* or quality of the goods. Chitty on Contracts, 392; Story on Contracts, 381, 382, 383; *Acebal v. Levy*, 10 Bing. 376; *Howe v. Palmer*, 3 B. & Ald. 321; *Lloyd & Pulliam v. Wright, Griffith & Co.*, 20 Ga. 574.” *Shepherd v. Pressey*, 32 N. H. 49.

In *Maxwell v. Brown*, 39 Me. 98, the court say: “From the language of this statute it is apparent, that when there is no written contract, a mere delivery will not be sufficient. There must further be an acceptance by the purchaser, else he will not be bound. In *Baldehy v. Parker*, 2 B. & C. 37, ‘it was formerly considered,’ observes BEST, J., ‘that a delivery of goods by the seller was sufficient to take a case out of the 17th section of the statute of frauds; but it is now clearly settled, that there must be an acceptance by the buyer as well as a delivery by the seller.’” In the same case HOLROYD, J., said: “As long as the seller preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them as his own, within the meaning of the statute.”

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Judge WRIGHT, in *Shindler v. Houston*, 1 N. Y. 261, 269, says: "The best considered cases hold that there must be a vesting of the possession of the goods in the vendee, as absolute owner, discharged of all lien for the price on the part of the vendor, and an ultimate acceptance and receiving of the property by the vendee, so unequivocal that he shall have precluded himself from taking any objection to the quantum or quality of the goods sold." See *Kirby v. Johnson*, 22 Mo. 354; *Keiwert v. Meyer*, post, p. 587; *Hewes v. Jordan*, 39 Md. 472; *Hooker v. Knab*, 26 Wis. 511; *Stone v. Browning*, 51 N. Y. 211; *Gibbs v. Benjamin*, 13 Am. L. Reg. (N. S.) 93 and note; *Stone v. Browning*, 68 N. Y. 598; *Edwards v. The Grand Trunk R. W. Co.*, 54 Me. 105; *Johnson v. Cuttle*, 105 Mass. 447; a. c., 7 Am. Rep. 545.

In the case at bar the contract was void by the statute of frauds. There was no acceptance of the goods by the purchaser.

The judgment is reversed, with costs, and the cause remanded for a new trial.

Judgment reversed.

STATE EX REL. CAVINS V. SANDERS.

(68 Ind. 562.)

Guardian and ward — investment of ward's money in guardian's business — liability of surety.

The investment of the ward's money by the guardian in his own business, or in the business of others in which he has an interest, as a mere business investment, is a conversion of such money, for which he becomes immediately liable on his bond.

ACTION on a guardian's bond. The opinion states the fact. Defendant had judgment below.

A. G. Cavins, for appellant.

R. R. Taylor, E. E. Rose and Mr. Short, for appellees.

NIBLACK, J. This was an action on a guardian's bond, for the conversion of a ward's assets by the guardian, for loaning the assets to insolvent persons, and for not taking security for loans made by the guardian.

The complaint showed that on the 9th day of March, 1870, the defendant, Riley Sanders, was appointed guardian of the person and estate of Abraham L. Milam, a minor, and that one John G. Owen became the surety of the said Sanders, on his bond as such guardian; that while the said Sanders was such guardian, and the said Owen was his surety, as aforesaid, on his said bond, there came into the said Sanders' hands, as assets of his said ward, the sum of \$5,000, concerning the management of which breaches were assigned, as above stated; that on the 5th day of January, 1876, the said Sanders was removed from his said guardianship, and Elijah H. C. Cavins, the relator in this action, appointed as his successor; and that the said Owen had died, and the other defendant, Simon Bland, had been appointed administrator of his estate.

The defendant Bland answered in general denial; also, that the said Owen, in his life-time, to wit, on the 29th day of March, 1874, had been released from further liability on said guardian's bond, and a new bond had been executed on that day, in place of the bond on which he, the said Owen, was so surety; and that the alleged misconduct of the said Sanders did not occur until after the said Owen was released from his said suretyship. Sanders made no defense.

The plaintiff replied in denial, and upon a trial by a jury there was a verdict for the defendant, and judgment accordingly.

By causes assigned for a new trial, some questions are reserved upon the evidence and the instructions of the court.

It was shown on the trial, that on the 29th day of March, 1874, Owen was discharged from further liability as surety on the bond signed by him, and that the said Riley Sanders had thereupon executed a new bond with Isam Sanders, his father, as his surety; that on the 26th day of May, 1874, there was a balance in the hands of the said Riley Sanders, as such guardian, of \$3,480.07; that all of that sum, except some interest, had come into his hands some time before the release of Owen from the original bond; that most, if not all, of the aggregate amount received by him as assets of his said ward had been loaned to and invested at different times, as received, in the business of Sanders & Sons, in farming, before Owen was released as his surety; that the firm of Sanders & Sons was composed of Isam Sanders, Perry Sanders, and the said Riley Sanders, the guardian; that the said Riley Sanders took no note or security for the money thus loaned to and invested in the bus-

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ness of Sanders & Sons ; that he charged it to the firm on a memorandum book, by putting down the amounts received from time to time and the dates of receiving them ; that there were no charges of these amounts in any other way ; that the firm of Sanders & Sons went into bankruptcy in February, 1875, and had never repaid or refunded the money loaned to it and invested in its business by the said Riley Sanders, as such guardian, as above stated, and that the estate of said firm would not probably pay more than twenty-five cents on each dollar of its indebtedness.

As to the facts thus shown on the trial, there was no conflict in the evidence.

It is the duty of a guardian to loan or otherwise invest the money of his ward in his hands, in such a way as to keep it all the time at interest, as far as practicable, and to use due care in making such loans or investments. He is not permitted to use such money for his own benefit, or to make any profit out of it for himself. 2 Kent's Com. 229. The rule in that respect is very strict. Guardians, and all other trustees of the moneyed concerns of others, are answerable for any mismanagement or unauthorized dealings with the trust moneys in their hands, and any misapplication of such moneys is a conversion of them, within the meaning of the statute relating to guardians. 2 R. S. 1876, p. 592, § 13; p. 549, § 162. It is their duty to preserve the identity as well as the existence of the fund under their control. If they destroy the fund, they render themselves responsible for it at once. If they pay away the money as their own, the trust is practically at an end. 1 Add. on Torts, 441; *Stumph v. Pfeiffer*, 58 Ind. 472; Perry on Trusts, §§ 463, 464.

The investment of the money in his hands, by a guardian, in his own business, or in the business of others, in which he has an interest, as a mere business investment, is a conversion of the money for which he is liable on his bond. If he refunds or settles with his ward or other person to whom he is responsible, before suit is instituted on his bond, his surety is discharged ; otherwise the surety is answerable for his principal.

In this case, we think it was plainly shown that Riley Sanders simply invested the money of his ward in the business of the firm of Sanders & Sons, for the benefit of himself and his partners, and that the transaction was in no sense a legitimate loan of the money to that firm, but only a conversion of the money, for which the said Riley Sanders became immediately liable on his bond.

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In this view of the case, the question as to the solvency of Isaac Sanders at the time he signed the new bond, which seems to have occupied considerable time on the trial, was both an irrelevant and immaterial one, tending to confuse the minds of, if not to mislead, the jury.

In our opinion the court erred in refusing to grant a new trial, as the verdict appears to us not to have been sustained by the evidence.

The judgment is reversed, with costs, and the cause remanded for a new trial.

Judgment reversed.

KEIWERT V. MEYER.

(63 Ind. 587.)

Contract — law of place — delivery to common carrier — acceptance.

Plaintiff, a resident of Wisconsin, sued defendant, a resident of Iowa, on account for intoxicating liquors sold and delivered pursuant to an oral order given in Iowa. Defendant answered that the sale was in violation of an Iowa statute. Plaintiff replied that the sale was also void under the Iowa statute of frauds, but that plaintiff had avoided the effect of both statutes by delivering the goods to a carrier in Wisconsin for transportation, in accordance with an agreement at the time of the sale. On demurrer, *add* that the answer was good and the reply was bad.*

ACTION for goods sold and delivered. The opinion states the facts. The defendant had judgment below.

O. B. Liddell, for appellants.

J. Swartz, for appellee.

PERKINS, J. Suit by the appellants against the appellee to recover for goods sold and delivered.

The appellee (defendant below) answered in two paragraphs, substantially alike, that the goods sold and delivered were intoxicating liquors; that they were sold in the town of Connover, in the State of Iowa; that there was before and at the time of said sale a

* See *Hausman v. Nye*, ante, p. 199.

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law in Iowa prohibiting the sale of intoxicating liquors in said State, setting forth in his answer a copy of the law and negating the fact that they were sold for medical, etc., purposes.

A copy of the law, as we have said, was made part of the answer. It forbade the manufacture or sale of any intoxicating liquors under a penalty; subjected the property to forfeiture, etc., except that they might be sold for mechanical, medicinal, etc., purposes.

The allegations of the answer brought the sale in question within the statute, and rendered the answer good.

Reply: 1st. In general denial. 2d. "And for further reply to the first and second paragraphs of defendant's answer the plaintiffs say that they (plaintiffs) live in Milwaukee, in the State of Wisconsin, and that said Emil Keiwert, one of the plaintiffs, on the — day of May, 1866, visited the town of Connover, in the State of Iowa, and took a verbal order for a bill of goods from the said defendant, which is the same as that mentioned in plaintiff's complaint, to be sent to defendant, when said plaintiff returned to Milwaukee; and plaintiffs say that afterward, on the — day of —, 1866, they (plaintiffs) shipped by railway from Milwaukee, Wisconsin, to defendant, the goods mentioned in their bill of particulars, pursuant to said order made in Connover, Iowa; and plaintiffs say that defendant received said merchandise at Connover, Iowa, and accepted the same, ratifying said delivery at Milwaukee, Wisconsin. But plaintiffs say that at the date of said order or direction given by the defendant to Emil Keiwert in the State of Iowa, there was in force a statute for the prevention of frauds and perjuries, which contains, among other provisions, the following, viz.: (Said law, or so much thereof as is pertinent, is set out in an exhibit marked "A," filed herewith.) And plaintiffs say that, by virtue of said statutes, the said sale in the State of Iowa was an executory contract, void and completed only by delivery to said railway company as common carriers in the State of Wisconsin. And plaintiffs say there was no memorandum or writing, signed by plaintiffs or their authorized agent in the State of Iowa, of said bargain or sale, and no part of the purchase-money paid or part of the property delivered in said State of Iowa at the time of meeting in said State of Iowa by plaintiffs and defendant.

"And for further reply to first and second paragraphs of defendant's answer, plaintiffs say that on the 10th day of May, 1876, one of the plaintiffs, Emil Keiwert, in the State of Iowa, took an order

from defendant to send him (defendant) from Milwaukee, Wisconsin, by the Milwaukee and Prairie Du Chien Railroad Company, the goods mentioned in plaintiffs' complaint, and that in pursuance of said order of defendant, plaintiffs delivered said stock of merchandise to said railway company, which delivery was ratified by defendant by acceptance of said goods from said railway company in the State of Wisconsin; and plaintiffs further say, that at said date there was in force in said State of Iowa, to prevent frauds and perjuries, a statute which, among others, contained the following provisions, viz.: (Said act, or so much thereof as is pertinent, is set out in an exhibit marked 'A,' filed herewith.) And plaintiffs say, at the meeting in said State of Iowa by Emil Keiwert and defendant, there was no memorandum or writing, signed by plaintiffs or their authorized agent, of said contract, and that no part of said property was delivered, and no part of the purchase-money paid, until said delivery of said goods to said railway company in the State of Wisconsin."

EXHIBIT A.

"SEC. 4006. Except when otherwise specially provided, no evidence of any of the contracts enumerated in the next succeeding section is competent unless it be in writing and signed by the party charged, or by his lawfully authorized agent.

"SEC. 4007. Such contracts embrace:

"1. Those in relation to the sale of personal property, when no part of the property is delivered and no part of the price is paid." Revision 1860, p. 691.

A demurrer to the second and third paragraphs of the reply was sustained, and execution entered. The plaintiffs withdrew the first paragraph thereof, and elected to stand upon the rulings upon demurrer, and the defendant had judgment.

The parol contract for the sale of the liquors in question was clearly an Iowa contract. It was a final contract. Both parties to it had power to make it such. Keiwert, one of the plaintiffs, went from Milwaukee to Iowa to solicit the contract. The first proposition will be presumed, in the absence of any thing showing the contrary, to have been made by him, for the sale of the liquors. It was accepted by Meyer, the appellee. The contract was closed in Iowa. *Tegler v. Shipman*, 33 Iowa, 194; s. c., 11 Am. Rep.

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118. See *Territt v. Bartlett*, 21 Vt. 184; *The State v. Comings*, 28 id. 508.

It might have been different had the verbal proposition or order for the goods been sent from Meyer to, and been accepted by, the vendors in Wisconsin. In *Kling v. Fries*, 33 Mich. 275, where the agent of a firm of wholesale liquor dealers in Ohio solicited and obtained an order for liquors from a retail dealer in Michigan, to be sent by said agent to the wholesale dealers in Ohio for acceptance, and it was by them accepted in Ohio, this was held to be an Ohio contract.

“It was suggested on the argument, that as the agreement was for the purchase of goods to the amount of more than fifty dollars, it was void under the statute of frauds for want of writing, and consequently did not take effect as an agreement until acted upon by the delivery of the goods to a carrier in Ohio. But if we assume the original invalidity of the agreement in this State on this ground, it cannot, we think, help the vendors. If void originally it would not become binding upon the purchaser until he should do something in ratification of it, and it does not appear that any thing further was done by him until the liquors were received in this State. His void order could not make any carrier to whom the vendors should see fit to deliver the goods his agent.” COOLEY, C. J., in *Webber v. Howe*, 36 Mich. 150; s. c., 24 Am. Rep. 590. And the acceptance of the goods by the purchaser in Iowa could not, upon the facts in this case, relate back to their shipment in Milwaukee so as to make a Wisconsin contract. In this case, as was the fact in *Webber v. Howe*, *supra*, the order was taken by the principal, and the contract was complete, in Iowa.

In the case of *Kling v. Fries*, *supra*, the order was taken by an agent of the vendor, subject to the acceptance or rejection of the latter, so that the contract was not consummated till acceptance by the vendor, in Ohio. That acceptance made it an Ohio contract.

It is suggested further, that as the goods were delivered in Milwaukee, Wisconsin, to a carrier designated by the purchaser, this was an acceptance of the goods in Wisconsin and an execution of the contract in that State. This might have been so had the contract not been void by the statute of frauds. But the law is, that such delivery does not operate to take a contract, void by the statute of frauds, out of the statute. The void contract or order for the goods does not constitute an acceptance of them by the vendee,

thereby validating the contract. Nor does the designation of a carrier in such void contract or order clothe him with power to make such acceptance for the vendee. The vendor, being chargeable in law with knowledge of the invalidity of such contract or order, who delivers the goods to the carrier upon it, takes the risk of their acceptance by the vendee on arrival.

In *Krudler v. Ellison*, 47 N. Y. 36; 7 Am. Rep. 402, it is said: "Where the contract of purchase and sale is not valid or complete by reason of the statute of frauds, the goods being over the value of £10, and the title, therefore, still vests in the consignor, though the goods have been delivered to the carrier, no acceptance, and all still vesting [resting?] in parol, the action must be brought by the consignor. *Coombs v. The Br. and Ex. R. Co.*, 3 Hurl. & Nor. 510. But all the judges, in delivering opinions, admitted the rule to be, that the consignee must have brought the action had the order been in writing, and the sale valid. The question was whether the property passed to the vendee. If it did, he must sue."

In *Allard v. Greasert*, 61 N. Y. 1, it is expressly decided, that a delivery to a specified carrier does not constitute an acceptance by the vendee, and will not take the contract out of the statute. There being no valid contract at the time of the delivery, the carrier, in such case, has no power to bind the vendee by an acceptance of the goods; though it is held that a vendee may accept before delivery. *Cross v. O'Donnell*, 44 N. Y. 661; s. c., 4 Am. Rep. 721. As if a subsequent buyer examines and selects particular articles of goods, and afterward sends a legal, valid order for those selected articles.

In *Johnson v. Cuttle*, 105 Mass. 447; s. c., 7 Am. Rep. 545, the court uses this language: "Mere delivery is not sufficient; there must be unequivocal proof of an acceptance and receipt by him" (the buyer). "Such acceptance and receipt may indeed be through an authorized agent. But a common carrier (whether selected by the seller or by the buyer), to whom the goods are intrusted without express instructions to do any thing but to carry and deliver them to the buyer, is no more than an agent to carry and deliver the goods, and has no implied authority to do the acts required to constitute an acceptance and receipt on the part of the buyer and to take the case out of the statute of frauds. *Snow v. Warner*, 10 Metc. 132; *Frostburg Mining Co. v. New England Glass Co.*, 9 Cush. 115; *Boardman v. Spooner*, 13 Allen, 853; *Quintard v. Bacon*, 99 Mass. 185; *Norman v. Phillips*, 14 M. & W. 277; *Nick-*

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elson v. Bower, 1 El. & El. 172." *Caulkins v. Hellman*, 47 N. Y. 449; s. c., 7 Am. Rep. 461. See *Hausman v. Nye*, ante, p. 485.

An examination of the authorities satisfies us that the decision in the cause below was right, and should be affirmed.

Affirmed, with costs.

Judgment affirmed.

CALLAHAN V. STATE.

(63 Ind. 128.)

Criminal law — seduction under promise of marriage — whether promise need be valid.

A statute made it felony for any person, under promise of marriage, to have illicit carnal intercourse with a female infant of good repute for chastity. *Held*, that the promise need not be a valid one, in fact, if the infant understood it to be valid; and the indictment need not allege that the defendant was unmarried at the time.

CONVICTION of seduction. The opinion states the facts.

A. A. Chapin and J. D. Ferrall, for appellant.

T. W. Woollen, attorney-general, for the State.

WORDEN, J. An indictment was found against the appellant for seduction, the charging part of which was as follows: "That Edmon Callahan, on the 18th day of November, A. D. 1877, at said county, feloniously had illicit intercourse with, and carnal knowledge of, Olive Crampton, a female of good repute for chastity and under the age of twenty-one years, by means of a promise of marriage to her previously made by the said Edmon Callahan."

The sufficiency of the indictment was tested by motions to quash and in arrest of judgment. Plea, not guilty; trial and conviction.

The indictment was based upon the following statutory provision:

"Any person who, under promise of marriage, shall have illicit carnal intercourse with any female of good repute for chastity, under the age of twenty-one years, shall be deemed guilty of seduction, and upon conviction, shall be imprisoned in the State prison for not less than one, nor more than three years, and fined not ex-

ceeding five hundred dollars, or be imprisoned in the county jail not exceeding six months; but in such case the evidence of the female must be corroborated to the extent required, as to the principal witness, in cases of perjury." 2 R. S. 1876, p. 431, § 15.

It will be seen by the statute, that, in order to constitute the offense, the intercourse must be had "under promise of marriage," while the indictment charges that it was had "by means of a promise of marriage." It is objected that the indictment is bad in consequence of this departure from the language of the statute.

But we are of opinion that the language of the statute, and that employed in the indictment, signify substantially the same thing. It was so held in the case of *Stinehouse v. The State*, 47 Ind. 17. The evident purpose of the statute was to make it a penal offense to have illicit carnal intercourse with a female of the description mentioned, where she is induced to consent thereto, and her consent is obtained, by or through the means of a promise of marriage. The departure in the indictment from the language of the statute is not material. The exact language of the statute need not have been employed. 2 R. S. 1876, p. 385, § 59. The indictment was good.

The appellant asked several instructions, which were refused by the court, and which need not, for the purpose of understanding the points made, be here set out at large. They were based upon two leading ideas: first, that the promise of marriage, in order to bring the appellant within the statute, must have been legal, valid and binding upon him, as matter of contract; and second, that if the promise was made on the condition that the prosecutrix would consent to the sexual intercourse, the promise was *turpis contractus*, and void on general principles of law; and that, if such was the character of the promise, the case does not come within the statute.

It is said by Bishop, in speaking of the New York statute, which is very similar, though in some respects dissimilar, to our own, that "it has been held, that, as an element in the offense, an apparently valid promise of marriage between the seducer and the seduced is necessary; therefore, where the man is married, living with his wife, and the woman knows it, his act of seduction is not within the statute. If she were ignorant of his subsisting marriage, the consequence would be otherwise; because the promise then would be binding on him, to the extent of enabling her to maintain against him her civil suit for its breach. Moreover, he need not be of age; it is sufficient if he has arrived at puberty. If the mar-

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riage promise is made at the time when she yields to him, and not before, and is the inducement for her yielding, the case is still within the statutory provision." Bishop on Statutory Crimes, § 639.

We can very well understand, that, if the man making the promise was a married man, living with his wife, and the woman claimed to have been seduced knew that fact, the case could not come within the statute; because in such case, the sexual intercourse could not, with any propriety, be said to have been had under, or by means of, the promise of marriage. In such case the promise of marriage, which the woman must know could not be fulfilled, could be no inducement to her consent to the intercourse.*

But we are not prepared to say, that in all cases there must be a valid, or apparently valid, and binding promise of marriage; one on which the promise could maintain an action, in order to make out a case of seduction within the statute.

[Omitting *obiter* remarks.]

But as before intimated we do not pass upon this question, inasmuch as, in our opinion, if it be conceded that the appellant's promise was void, as being conditioned upon the consent of the prosecutrix to the intercourse, the case still comes within the letter and spirit of the statute.

There is nothing in the statute that requires the promise of marriage to be free from all legal objections, viewed as the foundation of an action for its breach. Its purpose was to prevent the obtaining of the female's consent to sexual intercourse, by means of a promise of marriage; to protect her from the arts of designing and unprincipled men in whom she may repose trust and confidence, and to whose solicitations she may yield, believing that their promises of marriage are made in good faith, and will be fulfilled. It is not to be supposed that she will pause to consider, even if she were capable of judging, whether the promise is valid in law, and one on which she could maintain an action if broken. It is not to be assumed in such case, that her consent to the intercourse is given in consequence of her reliance upon an action upon the promise, for damages, in case of its breach; but it may be given upon the confidence she places in the good faith of the promise, believing, not that it will be broken, but fulfilled. We are supported in these views by the decisions of the Court of Appeals of New York.

* To this effect is *People v. Alger*, 1 Park. Cr. 333. [Rep.]

In the case of *Kenyon v. The People*, 26 N. Y. 203, which was a prosecution for seduction, the court said: "The judge charged the jury that if they were fully satisfied from the evidence that the defendant promised to marry the prosecutrix, if she would have carnal connection with him, and she believing and confiding in such promise, and intending on her part to accept such offer of marriage, did have such carnal connection, it is a sufficient promise of marriage under the statute. This seems to me unobjectionable. It is not necessary that the promise should be a valid and binding one between the parties. The offense consists in seducing and having illicit connection with an unmarried female, under promise of marriage. It is enough that a promise is made which is a consideration for or inducement to the intercourse. But if the statute required the promise to be a valid one, the charge was correct. A mutual promise on the part of the female seduced is implied if she yields to the solicitations of the seducer, made under his promise to marry." See, also, *Boyce v. The People*, 55 N. Y. 644.

We are of opinion, for these reasons, that no error was committed in refusing the charges.

We may observe that the charge given by the court very fairly placed the law of the case before the jury, even if some of them were not more favorable to the defendant than he could legally claim.

[Omitting remarks on evidence.]

We find no error in the record.

The judgment below is affirmed, with costs.

Judgment affirmed.

STARCK V. STATE.

(68 Ind. 285.)

Criminal law — conversion of estrays, when larceny.

When one converts an estray to his own use, there must have been a felonious intent to steal it at the moment of taking in order to constitute larceny.*

CONVICTION of larceny. The opinion states the facts.

*See ante, *Bowen v. Sullivan*.

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W. Spangler, for appellant.

T. W. Woollen, attorney-general, for the State.

WORDEN, J. The appellant was indicted in the court below for the larceny of a heifer, and, upon trial was convicted of the offense.

The facts appear to have been, that the heifer was a stray animal, that came to the premises of the appellant in the spring of 1877, and herded to some extent with his cattle. He drove her away, but she came back, and he fed her with his cattle. Finally, in June of that year, he killed the heifer, and appropriated her to his own use.

There did not appear to have been any marks upon the heifer, from which he could have ascertained her ownership; nor did it appear that the appellant knew or could have ascertained her ownership by reasonable inquiry.

The appellant asked the court to charge the jury as follows :

“If the jury find, from the evidence, that the property mentioned in the indictment was an estray, and that at the time the same came into possession of the defendant by finding it or letting it run with his cattle, and taking care of it with his cattle, and at the time he first got possession of it, he did not intend to steal it, but that the intention to steal it came upon him afterward, and in pursuance of this intention, formed after he first got it, he did kill and convert the same to his own use, this would not constitute larceny, and in that case your verdict should be for the defendant.”

This charge the court refused, but gave the following:

“That if the jury believe, from the evidence, beyond a reasonable doubt, that, at the very time the defendant took possession of the animal described in the indictment, he intended to steal it and convert it to his own use, [and] did, in pursuance of such intention, kill and convert the same to his own use, all the other material allegations having been made out, this would make the defendant guilty of either grand or petit larceny, according to the value.”

It is claimed by counsel, the larceny could not have been committed, under the circumstances. Where the finder of goods (not stray animals) does not know the owner, and has nothing to indicate who the owner may be, or where he may be found, his appropriation of the goods will not be larceny, even though he has not advertised the goods. And the mere fact that he had secreted the

goods, or denied finding them, will not make it larceny. *Bailey v. The State*, 52 Ind. 462.

But it is said in 2 Whart. Crim. Law, § 1799, that "The rule, that larceny is not committed by one who finds goods, the owner of which he supposes cannot be ascertained, does not apply to one who finds cattle at large in a highway and converts them to his own use." The authorities cited are : *People v. Kaatz*, 3 Park. C. R. 129; *The State v. Martin*, 28 Mo. 530; *The State v. Williams*, 19 id. 389. It is said, in the same section, that "it is larceny to take a horse found astray on the taker's land, with intent to conceal it until its owner shall offer a reward for its return, and then to return it, and claim the reward." *Commonwealth v. Mason*, 105 Mass. 163; s. c., 7 Am. Rep. 507; see, also, *Regina v. O'Donnell*, 7 Cox's C. C. 337.

We find it unnecessary to pass upon the question, for the purposes of the case. We think it abundantly clear, that in order to constitute larceny, the appellant must have intended to appropriate the animal to his own use, at the time he first took possession of it ; and that a conversion in pursuance of a subsequently formed intention would not make him guilty of larceny. *Regina v. Matthews*, 12 Cox's C. C. 489; s. c., 6 Eng. Rep., Moak's Notes, 329; *Umphrey v. The State*, ante, p. 223.

The charge given by the court was correct ; but it stated only one side of the proposition. The court said to the jury, in substance, that if the appellant, at the very time he took possession of the animal, intended to steal it and convert it to his own use, that would constitute larceny. Perhaps the jury might well have inferred from the charge, that, *unless* the felonious intent was formed at the time the appellant took possession of the animal, the conversion would not amount to larceny. But we think the appellant had the right to have the jury so informed, in express terms, so that the point of law would not be left to inference or conjecture. The charge that if the felonious intent was formed at the time the appellant took possession of the animal, the conversion would constitute larceny, did not necessarily carry with it the conclusion, that if it was not then formed, but afterward, the conversion would not amount to larceny.

The jury were the judges of the law and the facts ; and when they retired for consultation they may have said, "the court has advised us as to the effect of the formation of the felonious intent

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at the time the defendant took possession of the animal, but has said nothing about the effect of the formation of that intent afterward. We cannot see that it makes any difference when the intent to steal was formed, if it was formed and executed."

We think the court erred in refusing the charge asked.

Besides, the evidence is quite unsatisfactory upon the point of the felonious intent at the time the animal came into the defendant's possession.

The judgment below is reversed, and the cause remanded for a new trial.

Judgment reversed and cause remanded.

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(63 Ind. 344)

Constitutional law — extradition — inquiry into facts alleged in requisition.

A State statute, prohibiting the surrender of a citizen or resident of that State as an alleged fugitive from justice, upon the requisition of the governor of another State, when it shall be made to appear that such alleged fugitive was in the former State at the time of the alleged commission of the crime and providing for such an inquiry, is constitutional.*

APPPLICATION for *habeas corpus*. The opinion states the facts. The petitioner was discharged.

G. W. Plummer and *J. T. Saunderson*, for appellant.

J. R. Trozell, *P. H. Ward*, *C. H. Test*, *J. Coburn* and *E. Bassett*, for appellee.

Howk, C. J. This was an application by the appellee, James O. Aveline, to the Newton Circuit Court, for a writ of *habeas corpus*.

In his verified complaint, the appellee alleged, in substance, that he was then in the custody of the appellant, George A. Hartman, and was illegally and wrongfully restrained of his liberty by the appellant, in the town of Kentland, in Newton county, Indiana,

* See *People v. Curtis* (50 N. Y. 321), 10 Am. Rep. 453.

on an alleged requisition from the governor of the State of Illinois to the governor of the State of Indiana :

“ 1. Because said petitioner is not and was not a fugitive from justice, from the State of Illinois to the State of Indiana, at the time of committing the alleged crime ;

“ 2. Because there is no sufficient charge against the said petitioner, either by the laws of Indiana or Illinois, specified in said alleged requisition ;

“ 3. Because there is no properly authenticated charge against said petitioner ;” and that he, the appellee, was sick and afflicted with the disease of rheumatism, so much that he could not walk, nor dress himself, or undress, without the assistance of some one of his family, and needed the constant attention of his physician and of his family, and could not, at that time, be removed without danger to his health.

Upon this verified complaint, the court awarded a writ of *habeas corpus*, addressed to the appellant, to which writ the appellant made return under oath, in substance, that he had the custody of, and restrained the appellee at said Newton county, upon a charge of obtaining goods under and by false pretenses in writing, and as agent and messenger of Shelby M. Cullom, governor of the State of Illinois, and by virtue of an order of arrest and warrant, issued under the hand of the Hon. James D. Williams, governor of the State of Indiana, and the seal of said State, directed to the sheriff of any county in said State, copies of which appointment and order of arrest were attached to and made parts of said return; that the appellee, who was the identical person named in said warrant and order of arrest, was arrested on December 18th, 1878, by the sheriff of Newton county, Indiana, by virtue of said order of arrest, and upon a hearing before the judge of the Newton Circuit Court was delivered to the appellant, as said messenger, by order of said judge, and the appellant had receipted to said sheriff for said appellee ; copies of said sheriff's return to the order of said judge and of the appellant's receipt were attached to and made part of said return, and that by virtue of said appointment, order of arrest, and order of said judge, the appellant then held possession of the appellee, the person named in said writ of *habeas corpus*, and in obedience to the command of said writ he then produced the body of the appellee in the court below, before the judge thereof, to do and receive what might be ordered concerning him.

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To this return, the appellee replied under oath, denying that he was a fugitive from justice, and alleging, among other things, that he was not in the city of Chicago, nor in the State of Illinois, at the time the crime charged against him was alleged to have been committed, nor had he been in said city or State for five years before, nor at any time since that time.

By agreement of the parties, the cause was tried by the court; and an opinion in writing having been rendered by the court, to the effect that the appellee should be discharged, the appellant excepted to this decision. It was then agreed by the parties that said written opinion should be made a part of the record of this cause, without a bill of exceptions, and that it should take the place of, and be considered as, a special finding of facts with the conclusions of law thereon; and accordingly it was so ordered by the court.

We set out this written opinion, as follows :

“This is an application for a writ of *habeas corpus*. The facts are as follows :

“On the 18th day of December, 1878, the governor of this State issued a warrant under his hand and the seal of the State, directed to any sheriff or constable.

“The warrant recites that the governor of Illinois has, by requisition directed to the governor of this State, demanded that James O. Aveline be arrested as a fugitive from justice of the State of Illinois, and delivered to George A. Hartman, the agent appointed by the governor of Illinois to receive said Aveline. The warrant contains a copy of the criminal charge made against said Aveline, which is embraced in an affidavit sworn to before a justice of the peace in Chicago, to the effect that said Aveline did, in Cook county, in the State of Illinois, on August 30, 1878, by means of certain false and fraudulent representations and pretenses, made in writing and signed by said Aveline, of his own responsibility and wealth, obtain from Stitlauer Brothers & Co. credit, and did then and there obtain of said parties goods, merchandise, etc., of the value of \$727.55. The warrant commands the officer to arrest said Aveline, and to bring him forthwith before a Circuit judge for identification, and upon his identity being established, that he be then delivered to said agent to be transported to the State from which he has fled. This warrant came to the hands of the sheriff of this county on Saturday. He arrested said Aveline, and the

latter, being brought before the judge of this court, admitted that he was the person named in the warrant; whereupon the judge made an order directing the sheriff to deliver said Aveline to said agent, which was done. In that proceeding, no evidence was introduced or offered, nor was the fact in any way brought to the attention of the judge, that said Aveline was in this State, and not in Illinois, at the time of the alleged commission of the crime charged against him. After his delivery to the agent (the defendant in this case), said Aveline applied to this court for a writ of *habeas corpus*. The defendant made a return of the writ, accompanied by copies of the papers under which he restrains the plaintiff of his liberty. In the trial of the case, after the return of the writ, it appeared clearly in evidence, that Aveline, at the time of the alleged commission of the crime charged against him, was in the town of Kentland, Indiana, where he has resided eight or ten years last past, that he has not been in the State of Illinois for four years, nor in the city of Chicago for eight years. Under the facts thus stated, the question is presented, whether Aveline is legally in the custody of said Hartman, as agent of the State of Illinois, to be transported to that State for trial, under the charge made against him. One clause of section 2, article 4, of the Constitution of the United States, reads: 'A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.'

"The extradition law of the United States, § 5278, R. S. of U. S., prescribes the mode of proceeding under the constitutional provision quoted. This proceeding relates to the case of a person fleeing from the State or Territory in which he is charged with crime, to another State or Territory. To authorize the removal of a person to another State or Territory, upon the requisition of the executive authority of such State or Territory, it seems necessary, first, that such person must be charged with the commission of a crime in such State or Territory; and secondly, that he must have fled therefrom to another State or Territory.

In a proceeding like the present, the question whether Aveline did or did not, in fact, commit the crime charged against him cannot be tried. *Nichols v. Cornelius*, 7 Ind. 611; *Robinson v. Flanders* 29 id. 10. But the fact can be tried, whether or not he is charged

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with a crime in Illinois, for without such charge, the governor of that State has no legal right to make requisition for him upon the governor of this State. The fact that such charge has been made is *prima facie* (perhaps conclusively, so far as this case is concerned) shown by the recitals and the copy of the affidavit contained in the governor's warrant.

“Being found in this State, in the absence of other proof, Aveline would *prima facie* be a fugitive from the justice of Illinois; but I think he is only *prima facie* so, and that it may be shown, as a matter of fact, that he was not in Illinois, but at his home in this State, at the time of the alleged commission of the crime charged against him.

“It may be assumed, that the State of Illinois has a statute similar to ours, in relation to the commission of crime in that State by persons at the time outside of the State; and it may further be assumed, for the purposes of this case, that the crime charged against Aveline, although perpetrated in Cook county, Illinois, was committed by him while he was at his home in Kentland, Indiana; still this does not, in my opinion, bring the case within the constitutional provisions in reference to the extradition of fugitives from justice. In other words, I think the constitutional provision and the act of Congress upon the subject relate only to persons who are personally present in the State or Territory when the crime is alleged to have been committed, and who flee thence to another State or Territory.

“If the law does not provide for a case like the present, it is an omission which the courts cannot supply. Statutes, and even constitutions, in restraint of personal liberty, must be strictly construed. They can have no application beyond their plain meaning.

“I find that the construction thus placed upon the Constitution and laws of the United States, respecting the extradition of fugitives from justice, is in harmony with that placed upon the same by our own legislature, the members of which are bound by an official oath, the same as myself.

“Section 7 of ‘An act to regulate the arrest and surrender of fugitives from justice from other States and Territories,’ approved March 7th, 1867, 2 R. S. 1876, p. 422, reads: ‘No citizen or resident of this State shall be surrendered under pretense of being a fugitive from justice from any other State or Territory, where it shall be clearly made to appear to the judge holding the examination pro-

vided for by the second section of this act, that such citizen or inhabitant was in this State at the time of the alleged commission of the offense, and not in the State or Territory from which he is pretended to have fled, and in such case the judge holding the examination shall discharge the person arrested, and forthwith report the facts to the governor.'

"Finding, as I do, therefore, that there is no legal cause for the restraint of the petitioner, Aveline, an order will be made for his discharge.
(Signed)

E. P. HAMMOND, *Judge*.

"December 20, 1878."

The appellant excepted to the conclusions of law, and the court rendered judgment for the discharge of the appellee from the appellant's custody, and from this judgment this appeal is now prosecuted.

In this court the appellant has assigned, as errors, the following decisions of the Circuit Court :

1. In hearing testimony and inquiring into the facts behind the appellant's return to the writ of *habeas corpus*, the appellee having already been identified.

2. The court had no jurisdiction to inquire as to the whereabouts of the appellee, at the time of the alleged commission of the crime charged.

3. The court erred in holding that the appellee was not a fugitive from justice from the State of Illinois.

4. That no sufficient cause was shown for discharging the appellee from the appellant's custody, and the court erred in granting a discharge.

The appellant has not assigned as error, in express terms, that the court erred in its conclusions of law upon the facts found, though perhaps the third and fourth alleged errors are equivalent to such an assignment. By excepting to the court's conclusions of law, the appellant, in legal effect, admitted that the facts were fully and correctly found by the court, but that it had erred in applying the law to those facts. *Cruzan v. Smith*, 41 Ind. 288; *Curry v. Miller*, 42 id. 320; *Lynch v. Jennings*, 43 id. 276; *Wharton v. Wilson*, 60 id. 591. In this case, the controlling facts found by the court were, that for a long time before, and at the time of, the alleged commission of the crime charged against him, and at no time since, the appellee had

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not been within the State of Illinois; and that as to that crime, he had not fled from the State of Illinois, nor to this State, where he had resided for eight or ten years last past; and that as to that crime, he was not, and could not have been, a fugitive from the justice of the State of Illinois. It is claimed, however, by the appellant's counsel, as we understand them, that the court below had no jurisdiction, under the Constitution of the United States and the act of Congress pursuant thereto, to inquire and decide whether or not the appellee had fled from the State of Illinois to this State, or whether or not the appellee was in fact a fugitive from the justice of the State of Illinois, as to the crime charged against him.

Section 2 of article 4 of the Constitution of the United States, as we construe its provisions, does not forbid such inquiry and decision by the State courts; nor is there any such prohibition in section 5278 of the Revised Statutes of the United States, which section contains the legislation of Congress on the subject of the extradition of fugitives from justice, as between the different States and Territories. Section 7 of the statute of this State in relation to the arrest and surrender of fugitives from justice, which section is set out at length in the special finding of Judge HAMMOND, *supra*, expressly authorized the proceedings had, and the decision made, in this case.

In the affidavit upon which the governor of the State of Illinois issued his requisition upon the governor of this State, for the arrest and surrender of the appellee, it was not charged that the appellee had fled from the State of Illinois to this State, or that he was a fugitive from the justice of the State of Illinois; nor was it alleged in the appellant's return to the writ issued in this case, that the appellee had so fled, or that he was such fugitive, or that the appellant held him in custody as such fugitive. It seems to us that a citizen ought not to be arrested and surrendered to the authorities of another State or Territory, as a fugitive from justice, without some better foundation for his arrest and surrender than the recitals in a governor's requisition. *Ex parte Joseph Smith*, 3 McLean, 121. In *Hurd on Habeas Corpus* (2d ed.), 612, it is said: "There must be an actual fleeing from justice, and of this the governor of the State of whom the demand is made as well as of the State making it should be satisfied. This is commonly shown by affidavit." 6 Am. Jurist. 226; *Lewin Crown Cases*, 266; *Ex parte Manchester*, 5 Cal. 237.

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In conclusion, we hold that no error was committed by the Circuit Court in its conclusions of law upon the facts found in this case.

The judgment is affirmed, at the appellant's costs.

Judgment affirmed.

**BOARD OF TRUSTEES OF LA GRANGE COLLEGIATE INSTITUTE V.
ANDERSON.**

(63 Ind. 367.)

Infancy — as defense to executory contract.

In an action on a promissory note executed to trustees of a college, as a contribution to an endowment fund, and payable on the condition that a specified sum should be "secured" for that purpose to a given date, the defendant answered that a portion of the required sum was secured by promissory notes of infants, as the plaintiff knew, and which the plaintiff fraudulently accepted. *Held*, insufficient, such notes being voidable only, and not void.

ACTION on a promissory note. The defendant had judgment below. The opinion states the facts.

A. A. Chapin, for appellant.

J. D. Ferrall, *A. Ellison* and *J. S. Drake*, for appellee.

NIBLACK, J. The board of trustees of the LaGrange Collegiate Institute sued William Anderson on a promissory note, as follows:

"\$50.00. Three years after date, I promise to pay to the trustees of the LaGrange Collegiate Institute the sum of fifty dollars, with interest from date annually, for the purpose of a permanent endowment fund, provided ten thousand dollars shall be secured for the purpose previous to August 15th, 1867.

WM. ANDERSON.

GREENFIELD, IND., *April 19th*, 1866."

The complaint averred that the sum of ten thousand dollars was secured as a permanent endowment fund before the 15th day of August, 1867, and that the note remained due and unpaid. The defendant answered in six paragraphs. The first, the general de-

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nial, and the rest setting up special matters in defense. The plaintiff demurred to each paragraph of the answer except the first but its demurrer was overruled. The plaintiff then replied to the special paragraphs of the answer, and after some further proceedings, which need not be here noticed, the cause was submitted to a jury for trial. A verdict was returned for the defendant, and judgment was rendered in favor of the defendant upon the verdict. Counsel for the appellant brings specially to our attention the question of the sufficiency of the fifth paragraph of the answer. That paragraph was as follows: "For a fifth defense to said action the defendant says, that the whole amount, secured to said fund, prior to the 15th day of August, 1867, was ten thousand dollars; that, of that ten thousand dollars, one thousand dollars was secured by promissory notes executed by persons each of whom was under twenty-one years of age at the time said notes were executed, which facts the plaintiff at the time knew, and the plaintiff accepted said notes of said minors with the fraudulent purpose of raising said fund up to ten thousand dollars, knowing that the said minors were not bound to pay any portion of said notes; that the following are the names of said minors, so far as defendant is informed, to wit, George C. Searing and George A. McKinlay."

We are of the opinion, that under the complaint and the proviso contained in the note sued on, it was sufficient for the plaintiff to produce in evidence notes, or other securities of equal apparent rank and value, similar to the note in suit, which had been obtained previous to, and were under the control of the plaintiff as an endowment fund, on the 15th day of August, 1867, amounting in the aggregate, with the note in suit, to \$10,000.00, in order to make out a *prima facie* case under the averment that \$10,000.00 had been secured as required by said proviso.

We are also of the opinion, that any special defense, intended as an attack upon the validity of any such notes or other securities, ought to have alleged facts showing that such notes, or other securities, were invalid when the time limited for taking them expired, that is, on the 15th day of August, 1867. By the terms of the note sued upon, the plaintiff had until that time in which to arrange and complete its measures for the securing of the sum required by the proviso.

The note of a minor is voidable only, and not void. It might have been, as charged, that some of the notes, when executed, were

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voidable by reason of the infancy of the makers, and yet, by the 15th day of August, 1867, had become valid and available securities by some subsequent arrangement between the parties.

In other words, conceding the allegations in the fifth paragraph of the answer to be true, yet the notes executed by the minors may have ceased to be voidable before the said 15th day of August, 1867. Tested by this rule, that paragraph of the answer was bad on demurrer.

But the appellee contends, that if there was error in overruling the demurrer to that paragraph, it was nevertheless a harmless error, as the evidence admissible under it might have been given under the general denial.

We cannot, however, sustain the position thus contended for by the appellee. Infancy, when set up as a direct defense to an action, must be specially pleaded. We think the same rule ought to be applied to the defense of infancy when interposed collaterally, as in the case at bar. This conclusion seems to us to be supported both by principle and by analogy.

The error committed by the court in overruling the demurrer to the fifth paragraph of the answer appears to us, therefore, to have been a material error, and one for which the judgment will have to be reversed.

Some other questions have been discussed by counsel, but as they may not again arise in the cause, we have not considered them.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

Judgment reversed.

HAYES V. MATTHEWS.

(63 Ind. 412.)

Negotiable instruments — immaterial alteration.

A promissory note, for the purpose of raising money for a church of which they were trustees, was executed in the usual form by several individuals, with the general addition of the words "Trustees of the, etc., church." These latter words were erased without their consent. *Held*, an immaterial alteration, as the makers were individually liable upon the note in its original form.*

*To same effect, *Burlingame v. Brewster* (79 Ill. 515), 22 Am. Rep. 177, and note, 178.

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ACTION on a promissory note. The opinion states the facts. The plaintiff had judgment below.

C. Clemans and J. H. Taylor, for appellants.

C. W. Chapman and H. S. Biggs, for appellee.

NIBLACK, J. John W. Matthews sued William Hayes, Samuel Galbreath and Joseph H. Taylor, administrator of the estate of George W. Ryerson, deceased, on the following promissory note:

“\$200.

PIERCETON, Ind., Jan’y 11, 1871.

“Twelve months after date, we promise to pay to the order of J. W. Matthews the sum of two hundred dollars, payable at _____, value received, without any relief from valuation or appraisement laws, with interest at ten per cent.

DR. W. HAYES,

“GEORGE W. RYERSON,

“S. GALBREATH.”

The defendants answered in two paragraphs:

1. That at the time of the alleged execution of the note sued on, the persons, whose names were attached to it as the makers thereof, were the trustees of the First Universalist Church, of Pierceton, Indiana, a corporation duly organized under the laws of the State; that said note was executed by the makers as trustees, as above stated, and not in their individual capacities, and was accepted by the plaintiff as the note of said corporation, and not otherwise; that when the said makers signed their names to said note there were attached to and placed opposite their names, the words “Trustees of the First Universalist Church, of Pierceton, Indiana;” that said words, so attached to, and placed opposite the names of said makers, had been erased from off the face of said note, without the knowledge or consent of said makers, and for the purpose of making them personally liable to pay said note. Wherefore the defendants denied the execution of the note sued upon; and said paragraph was verified by the affidavit of the defendants.

2. That the First Universalist Church, of Pierceton, Indiana, was a corporation duly organized under the laws of the State, and authorized to transact business as such, and that the makers of the note in suit were, at the time said note was executed, the trustees of such corporation; that said note was executed for money loaned

to such corporation, and as a church note; that said note was executed by the makers thereof as trustees, and in the manner and form directed by the church at a regular and public meeting, and was taken and accepted by the plaintiff as a church note; that the plaintiff loaned his money to the church corporation, and not to the makers of said note individually; that said makers did not use said money for their own benefit, but instead thereof used the same to build a church edifice.

The plaintiff demurred separately to each paragraph of the answer, and the court sustained his demurrer to both paragraphs.

The defendants declining to answer further, the court assessed the plaintiff's damages at the amount due upon the note, and rendered judgment for the amount of the damages so assessed against the defendants.

The appellants contend that both paragraphs of the answer were sufficient as defenses to the appellee's action, and that consequently the court erred in sustaining the demurrer to those paragraphs.

If the note in judgment in this action had the words, "Trustees of the First Universalist Church, of Pierceton, Indiana," attached to it, and following the names of the makers, it would not even then, on its face, purport to be the promise of the corporation known as the First Universalist Church, of Pierceton, Indiana, to pay the sum of money specified in it. It would still only be the personal promise of the makers to pay the sum named, the additional words constituting merely a description of the persons of the makers, without in any manner affecting the legal character of the note itself. We are sustained in that view of this case by the case of *Mears v. Graham*, 8 Blackf. 144, and several subsequent cases.

It has been held, that in order to bind the principal, and make it his contract, the instrument must purport on its face to be the contract of the principal, and his name must be inserted in it and signed to it, and not merely the name of the agent, even though the latter be described as agent in the instrument. *Prather v. Ross*, 17 Ind. 495.

Tested by this rule, the alleged erasure upon the face, or alteration of the note, set up in the first paragraph of the answer, was an immaterial erasure or alteration, and hence not well pleaded. See, also, *The Inhabitants of Congressional Township No. 11, etc., v. Weir*, 9 Ind. 224; *Hobbs v. Cowden*, 20 id. 310; *Means v. Swormstedt*, 32 id. 87; *Hays v. Crutcher*, 54 id. 260.

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As the note under consideration purported on its face to be in legal contemplation the individual note of the makers, it follows that any defense which involved the introduction of parol evidence, tending to give it a different construction, or to change its legal effect, was bad upon demurrer.

Cases have arisen upon defective or ambiguous instruments, in which parol evidence has been admitted to give effect to the intention of the parties to such instruments, but the precedents furnished by such cases are not applicable to the case before us.

We think the second paragraph of the answer was also insufficient.

We see no error in the record.

The judgment is affirmed, at the costs of the appellants.

JENKINS V. JENKINS.

(63 Ind. 415.)

Landlord and tenant—forfeiture of lease—demand of rent—service of notices to quit.

Where a lease, conditioned to be forfeited for non-payment of rent, provides no place for payment, payment must be demanded by the landlord of the tenant, on the premises, just before sunset on the specified day.

A statute, providing for notice to quit for non-payment of rent, required that it "be served on the tenant, or if he cannot be found, by delivering the same to some person of proper age and discretion, residing on the premises, having first made known to such person the contents thereof." *Held*, that this requirement was not answered by simply reading the notice to the tenant.

ACTION to recover real estate. The opinion states the facts. The plaintiff had judgment below.

E. P. Ferris and W. W. Spencer, for appellants.

W. D. Willson and C. H. Willson, for appellee.

Howk, J. In this action, the appellee, as plaintiff, sued the appellants, as defendants, to recover possession of certain real estate, and damages for the unlawful detention thereof.

[Omitting immaterial statements.]

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It appears from the averments of the appellee's complaint, that the appellant Alexander Jenkins was the tenant of the appellee, for and during her natural life, of certain described real estate, in Ripley county, Indiana, at an annual rental of two hundred dollars, payable on the 1st day of March in each year, during the continuance of the tenancy. It was stipulated in the written lease, a copy of which was made part of the complaint, that if the rent was not paid promptly, when due, the possession of the demised premises was to be surrendered up to the appellee; and again, that the lease was to extend during the appellee's natural life, if the rent was promptly paid, on or before the 1st day of March, in each year, as it became due. The appellee's suit against the appellants was for unlawfully holding over the possession of the demised premises, after the written lease had been determined.

In the appellee's complaint, facts were alleged for the purpose of showing that the written lease had been determined in two modes: 1. By the forfeiture of the lease, by a formal demand of the rent due from the tenant, on the premises, upon the 1st day of March, 1876, the day the annual rent for the preceding year became due and payable, and the failure of the tenant to pay such rent when thus demanded; and, 2. By a written notice to the tenant, on the 10th day of August, 1876, to quit the possession of said premises or pay the rent then due upon the same, within ten days from that date, and the refusal of the tenant to either quit the possession or pay the rent within said term of ten days.

In either one of these modes, if the law applicable thereto had been strictly complied with, it is very clear, we think, that the lease in question would have been determined thereby, and the appellee would have acquired a right to the possession of the premises as against her tenant, as if such lease had never been executed.

It is earnestly insisted, however, by the appellants' counsel, that in this case the jury found, in and by their special verdict, that the lease from the appellee to the appellant Alexander Jenkins had never been determined, according to law, in either of the two modes alleged in the complaint; that for this reason, the law of the case was with the appellants; and that it followed, of necessity, that the court below erred in overruling the appellants' motion for a judgment in their favor, on the special verdict.

The questions presented for our consideration and decision, by the special verdict and the appellants' motion for a judgment

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thereon, in relation to the alleged determination of the lease, may be thus stated :

1. Were the facts found by the jury, in reference to the day and hour, the place and the amount, of the demand made by the appellee, of the appellants, for the rent of the premises, sufficient to show a forfeiture of the lease ?

2. Was there a legal and sufficient service found by the jury, in their special verdict, of the appellee's notice to the appellant Alexander Jenkins, "to pay the rent or give possession in ten days ?"

We will consider and decide these two questions in their enumerated order :

1. In the sixth item of their special verdict, the jury found, that, on the 1st day of March, 1876, the appellee made a demand of the appellant Alexander Jenkins, on the premises, for the sum of four hundred dollars rent then due, or immediate possession of the premises, and that said demand was made at one o'clock, P. M., of said day, and at no other time.

It is clear, we think, that the appellee's demand of the rent, as found by the jury, was not sufficient to work a forfeiture of the appellant's lease. The demand, though made at the proper place, and on the right day, was not made at the proper time of the day. It should have been made just before sunset of the day on which it became due, on the premises, in order that the tenant's refusal to pay the rent should work a forfeiture of the lease. *Philips v. Doe*, 3 Ind. 132; *Meni v. Rathbone*, 21 id. 454; and *Bacon v. The Western Furniture Company*, 53 id. 229. In the case last cited, the landlord demanded of the tenant the rent due, on the day it became due, at three o'clock in the afternoon, at the tenant's business room, but not on the demised premises, and payment was then refused, and it was held that the lease was not forfeited.

In delivering the opinion of the court, it was said by BIDDLE, J. "Forfeitures are not favored in law. They must be strictly construed. In this case, to entitle the appellant to re-enter and possess the premises, he should have demanded the specific amount of rent due, just before sunset of the day upon which it became due, and upon the premises leased, there being no place of payment mentioned in the lease." *Taylor on Land. & Ten.*, §§ 297 and 493.

In the case at bar the jury did not find that the appellant had forfeited his lease from the appellee.

2. In the seventh item of their special verdict, the jury found that the notice to the appellant Alexander Jenkins, to pay the rent or give possession in ten days, was read to him, on the premises, and was not delivered to the appellants, or either of them. It is very certain, we think, that the service of the appellee's notice to the appellant Alexander Jenkins, as found by the jury, was not a legal, valid and sufficient service of such notice. In section 4 of "An act containing several provisions regarding landlords, tenants, lessors and lessees," approved May 20, 1852, it is provided, that "If a tenant neglect or refuse to pay rent when due, ten days' notice to quit shall determine the lease, when not therein otherwise provided, unless such rent be paid at the expiration of said ten days." 2 R. S. 1876, p. 340. It was under this section of the statute that the notice, mentioned in the special verdict, was intended to be given. In section 1 of said act, one month's notice, in writing, is required to be delivered to a tenant at will, and, in section 3, three months' notice must be given to a tenant from year to year, in order to determine the respective tenancies.

Section 6 of the same act provides as follows: "Sec. 6. Notice, as required in the preceding sections, may be served on the tenant, or if he cannot be found, by delivering the same to some person of proper age and discretion, residing on the premises, having first made known to such person the contents thereof." 2 R. S. 1876, p. 341.

By a fair and reasonable construction of these statutory provisions, we reach the conclusion, that the service of the appellee's notice to the appellant Alexander Jenkins, to pay the rent or give possession in ten days, as found by the jury in their special verdict was an illegal, invalid and insufficient service of such notice, and that the only proper and legal mode of serving such a notice is by delivering the notice to the tenant, or if he cannot be found, by delivering the same to some person of proper age and discretion, as provided in said section 6 of the statute. We are strengthened in this conclusion by the provisions of section 5 of "An act concerning the unlawful detention of lands and the recovery thereof," approved May 13th, 1852, under which act this suit was brought. This section 5 provides, that "Where notice to quit is required by law a copy of the same, with proof of service, shall be necessary to recover by the plaintiff." From the provision in this section, it seems to us that the implication is very strong that the law assumes that the notice to quit is in the tenant's possession, and for this

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reason it makes "a copy of the same" evidence necessary to a recovery by the landlord.

The question we are now considering, so far as we are advised, has never before been presented to nor decided by this court. The appellee's action is against a tenant holding over. Of such actions, justices of the peace have had jurisdiction in this State for many years. In Wick & Barbour's Treatise, 200, and in Iglehart's Treatise, 473, of the law before justices of the peace, in this State, it is said that the notice to quit "should be served by delivering it to the tenant, or if he cannot be found, by delivering it to some person of proper age and discretion, residing on the premises."

In the case of *Seem v. McLees*, 24 Ill. 193, in construing a statute of Illinois, which provided that a tenant holding over, "after demand made in writing for possession thereof," should be adjudged guilty of forcible detainer, etc., it was held by the Supreme Court of that State, that "A demand made by reading a paper to the tenant is not a demand made in writing. It is but an oral demand. The statute intended that the tenant should have a written demand, to which he could refer, and which he could examine, that he need not depend upon his memory to know what the demand was."

So we think with regard to the provisions of our statute for the service of notice to quit, by landlords upon their tenants.

In conclusion, we hold that the facts found by the jury, in their special verdict, show very clearly and conclusively that the appellant Alexander Jenkins' lease from the appellee was neither forfeited nor determined according to law, and therefore that the court below erred in overruling the appellants' motion for a judgment in their favor on the special verdict. This conclusion renders it unnecessary for us to consider any of the other errors assigned in this case by the appellants.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to sustain the appellants' motion for judgment in their favor, on the special verdict of the jury.

Opinion filed at May term, 1878.

Petition for a rehearing overruled at November term, 1878.

CITY OF GOSHEN v. KERN.

(68 Ind. 468.)

Statutory construction — auctioneer's license — one selling his own goods at auction.

One who sells his own goods at public auction is an auctioneer within the meaning of an ordinance requiring persons exercising the business of an auctioneer to be licensed.

SUIT for a penalty. The opinion states the facts. The defendant had judgment below.

R. M. Johnson, J. D. Osborn and E. G. Herr, for appellant.

J. A. S. Mitchell, H. D. Wilson and I. H. Simmons, for appellee.

Howk, C. J.: In this action, the appellant sued the appellee, before a justice of the peace of Elkhart county, to recover a penalty for an alleged violation of a certain section of a certain ordinance of said city of Goshen.

The trial of the cause before the justice resulted in a verdict and judgment in favor of the appellant, from which there was an appeal to the court below.

In the Circuit Court the appellee demurred to the appellant's complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was sustained by the court, and to this decision the appellant excepted. Thereupon the appellant moved the court for leave to amend its complaint, which was granted "upon the plaintiff submitting to judgment being entered in favor of the defendant for all costs taxed herein to this date," November 5th, 1875.

The appellant objected and excepted to any judgment being rendered against it for costs, except the costs of that term of court, and moved the court for permission to amend its complaint without being subjected to a judgment for costs, except the costs of that term, which motion was overruled by the court, and to this ruling the appellant excepted.

On the appellee's motion, the court then rendered judgment in his favor, on his demurrer, for the costs of suit, from which judgment this appeal is now prosecuted.

City of Goshen v. Kern.)

The appellant has assigned, in this court, the following decisions of the Circuit Court, as errors:

1. In sustaining the demurrer to its complaint ;
2. In refusing to allow the appellant to amend its complaint upon paying the costs accrued in said cause at the term of court when the demurrer was sustained, and when leave to amend was asked by the appellant ; and
3. In refusing to allow the appellant to amend its complaint unless it submitted to a judgment against it, the appellant, for all the costs that had theretofore accrued in the said cause.

We will consider these alleged errors, and decide the questions thereby presented, in their enumerated order.

1. In its complaint, the appellant alleged, in substance, that on the 4th day of September, 1875, the appellee violated section 3 of ordinance No. 21, duly enacted and adopted on the 21st day of December, 1874, by the common council of said city of Goshen, duly incorporated under the general law of this State for the incorporation of cities, in this, to wit: That on said first-named day, within the corporate limits of said city, the appellee did unlawfully exercise and perform the business of an auctioneer for the sale of goods, wares and merchandise, then and there belonging to, and in the possession of, the appellee, in the store-room occupied by him, in Thomas' block, on the east side of Main street, in said city, the said goods, wares and merchandise consisting of dry-goods, notions, boots and shoes, and such other articles of personal property as were usually contained in a general retail dry-goods store ; he, the appellee, being then and there neither an executor, administrator, or other officer of any court of law of this State, and said articles, so sold by him at auction as aforesaid, not being of the growth or manufacture of any citizen of Elkhart county, nor horses, cattle, hogs, sheep or other live-stock, nor farming utensils owned and manufactured by any citizen of said county, and the appellee not being then and there licensed thereunto, as such auctioneer, by the corporate authorities of said city, as by the ordinance of said city in such case made and provided, "and against the peace and dignity of said city." Wherefore the appellant prayed judgment against the appellee for one hundred dollars penalty, etc.

The controlling question in this case, as we understand it, may be thus stated:

Have the common council of a city incorporated under the general law of this State the power to regulate the sales of, and exact a license fee from, any one as an auctioneer, whose sales at auction are confined exclusively to sales of his own "goods, wares and merchandise?"

In the thirty-eighth clause of section 53 of the general law of this State providing for the incorporation of cities, it is provided, that "The common council shall have the power to enforce ordinances: * * *

"Thirty-eighth. To regulate the sale of all kinds of property at auction in the streets, stores, shops, or elsewhere in the city, and to license auctioneers, and require them to pay a reasonable per cent on the amount of sales." 1 R. S. 1876, p. 293.

Under this statutory power, the common council of the city of Goshen adopted section 3 of an ordinance No. 21, mentioned in the appellant's complaint, in which section it is ordained, that "Any person who shall exercise, within said city, the business of an auctioneer for any period of time, for the sale of goods, wares and merchandise, without having first obtained license, as provided hereinbefore, shall be fined in any sum not less than ten dollars nor more than fifty dollars, for each and every day, or fractional part thereof, he may so exercise said business." This section of said ordinance contained a proviso, which is not material to any question in this case, and need not be further noticed.

It is claimed by the appellee's attorneys, in their brief of this cause in this court, that the appellant's complaint is "fatally defective, for two reasons: 1st. For what it fails to say; and 2d. For what it does state."

Under the first of these reasons the appellee's counsel say, that the complaint is defective, because the appellant failed to set out therein either the ordinance or the section or the substance of the section, claimed to have been violated by the appellee. In this respect the complaint was sufficient; it gave "the number of the section charged to have been violated, with the date of its adoption," and that was a compliance with the requirements of the statute. 1 R. S. 1876, pp. 273, 274, § 19; *The City of Huntington v. Pease*, 56 Ind. 305; and *The City of Huntington v. Cheesbro*, 57 id. 74.

It is further objected to the complaint, that it "states the pleader's conclusions, not his facts. It charges the defendant with

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violating an ordinance by exercising and performing the business of an auctioneer within said city, but states no fact or facts." It seems to us, that the complaint is not open to this objection; for if the appellee performed the business of an auctioneer, he sold property by auction, and that fact is clearly charged. The charge would have been more specific, perhaps, if the complaint had stated the name of the person to whom the appellee sold the property. But if the complaint were defective for the want of such a statement, the defect is one which could not be reached by a demurrer for the want of facts, but only by a motion to make the complaint more specific. *Reynolds v. The State ex rel. Titus*, 61 Ind. 392.

It is earnestly insisted by the appellee's counsel, that the appellant's complaint was bad on the demurrer thereto, because it was alleged in the complaint, that the goods, wares and merchandise, for the sale of which the appellee was charged with performing "the business of an auctioneer," were "then and there belonging to, and in the possession of, the defendant," the appellee. Upon this point, the argument of counsel is founded upon one of the definitions of the word "auctioneer," in Bouvier's Law Dictionary, as follows: "A person authorized by law to sell the goods of others at public sale." If the term "auctioneer" had no other meaning than the limited one thus given it, the argument of counsel would be, perhaps, well founded; but Bouvier also defines an auctioneer as "one who conducts a public sale or auction." In Burrill's Law Dictionary, an auctioneer is defined as "one who conducts an auction or public sale;" and again, "as a person who is authorized to sell goods or merchandise at public auction or sale, for a recompense, or (as it is commonly called) a commission." In Wharton's Law Dictionary, auctioneers are defined to be "licensed agents appointed to sell property and to conduct sales or auctions." In Webster's Dictionary, the meaning of the word "auctioneer" is thus given: "A person who sells by auction; a person who disposes of goods or lands by public sale to the highest bidder." In Worcester's Dictionary the word "auctioneer" is defined as follows: "One whose business it is to offer property for sale by auction; one who invites bids at a sale by auction."

It will be seen by these various definitions of the word "auctioneer," by the best lexicographers, legal and otherwise, of our language,⁹ that it, as ordinarily used, has no such limited and confined meaning as the appellee's counsel have sought to give it. In the

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first rule prescribed by law in this State for the construction of statutes, it is provided that "Words and phrases shall be taken in their plain or ordinary, and usual sense." 2 R. S. 1876, p. 315, § 1. Under the allegations of the appellant's complaint, the appellee was an auctioneer, within the plain, ordinary and usual sense of that term, as used in the 38th clause of section 53 of the general law of this State for the incorporation of cities *supra*, and in section 3 of said ordinance No. 21, adopted by the common council of said city of Goshen. The statute gives the common council the power to regulate, to prescribe rules for the government of sales by auction within the city limits, and to require the auctioneer to procure a license of such sales; and the ownership of the property to be sold will not, and does not, in our opinion, affect, impair or prevent the exercise of these powers in any respect. The power given is in the nature of a police regulation, and it applies to all sales by auction, as well to those where the auctioneer sells his own property as to those where he sells the property of other persons. Under the power given by the statute, the appellant's common council adopted section 3 of said ordinance No. 21, which section made it penal for any person to exercise, within said city, the business of an auctioneer without first having obtained the proper license so to do from the appellant's corporate authorities.

[Omitting minor points.]

The judgment is reversed at the appellee's costs, and the cause is remanded, with instructions to overrule his demurrer to the appellant's complaint, and for further proceedings.

Judgment reversed.

FRY V. STATE.

(68 Ind. 552.)

Constitutional law — statute regulating issue and sale of tickets by passenger carriers.

A State statute provided that no passenger carrier should issue or sell any ticket subject to any condition limiting his liability, unless the same was printed thereon in type of a specified size; that every ticket seller should be furnished with a certificate of authority, which he should keep publicly posted; that every such carrier should provide for the redemption of tickets

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or parts of tickets sold but not used, at the purchase-price or a proportionate part thereof ; and that no such purchaser of tickets should otherwise sell them except to *bona fide* travellers ; and made disobedience a misdemeanor punishable by certain fines. *Held*, constitutional.*

CONVICTION under an act regulating the issuing and taking up of tickets by common carriers. The opinion states the facts.

Howk, C. J. The indictment against the appellant, in this case charged, in substance, that the appellant, on the 9th day of January, 1879, at and in the county of Marion, “did then and there unlawfully barter and sell, for a valuable consideration, to wit, the sum of ten dollars, to some person whose name is to the grand jurors unknown, a railroad ticket, the description and style of which said ticket is to the grand jurors unknown, for the reason that said ticket is lost and cannot be found, entitling and evidencing the right of the holder thereof, to wit, the person whose name is to the grand jurors unknown as aforesaid, to travel and be transported over some railroad, the name and style of which said railroad is to the grand jurors unknown, running from the city of Indianapolis, in the county of Marion and State of Indiana, to the city of St. Louis, in the State of Missouri. The grand jurors aforesaid, upon their oath aforesaid, do further present, that upon the said 9th day of January, A. D. 1879, at the time and place said Fry sold said ticket as aforesaid, to said person whose name is to the grand jurors unknown as aforesaid, to wit, at the county of Marion and State aforesaid, said Fry was not then and there the agent of the railroad whose name and style is to the grand jurors unknown as aforesaid, and said Fry was not then and there authorized to sell tickets or other certificates, evidencing the right of the holder thereof to travel and be transported upon said railroad, and he did not then and there have a certificate provided him by said railroad, setting forth his authority as agent of said railroad, signed by the managing officer of such railroad, and duly attested by its corporate seal ; that said George W. Fry had not purchased the said ticket evidencing the right of the holder thereof to travel and be transported by said railroad from the said city of Indianapolis, in the county of Marion and State of Indiana, to the said city of St. Louis, in said State of Missouri, from an agent of said railroad authorized to sell tickets

* See *Blake v. Winona, etc., R. R. Co.* (19 Minn. 418), 18 Am. Rep. 345; *Com. v. Eastern R. R. Co.* (103 Mass. 264), 4 Am. Rep. 555; *Penn. R. R. Co. v. Riblet* (66 Penn. St. 164), 5 Am. Rep. 300.

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or other certificates evidencing the right of the holder thereof to travel and be transported by said railroad, and provided with a certificate setting forth his authority as such agent to make such sales, signed by the managing officer of said railroad, and duly attested by the corporate seal of said railroad, with a *bona fide* intention of traveling on the same. Wherefore the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge, that said sale of said ticket, by said George W. Fry, to said person whose name is to the grand jurors aforesaid unknown as aforesaid, and in manner and form aforesaid, was and is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana."

The appellant moved the court to quash said indictment, which motion was overruled, and to this ruling he excepted.

On arraignment, the appellant's plea to said indictment was that he was not guilty as therein charged. The issues joined were tried by the court without a jury, upon an agreed statement of facts, and a finding was made by the court, that the appellant was guilty as charged in the indictment. The appellant's motion for a new trial was overruled by the court, and to this decision he excepted, and judgment was rendered against him by the court on its finding, from which judgment this appeal is now here prosecuted.

Errors have been assigned by the appellant, in this court, which call in question the following decisions of the court below. 1. The overruling of his motion to quash the indictment; and, 2. The overruling of his motion for a new trial.

In their argument of this cause in this court the appellant's learned counsel have expressly waived all "technical objections" to the indictment. They do not claim "that the grand jury had no legal authority to inquire into the offense charged;" nor do they claim "that the indictment contains any matter which, if true, would constitute a legal justification of the offense charged, or other legal bar to the prosecution." But the appellant's motion was evidently founded upon the second statutory cause for quashing an indictment, namely, "That the facts stated do not constitute a public offense." 2 R. S. 1876, 399, § 101.

The facts stated in the indictment in this case show, very clearly, that it was intended to charge the appellant, therein and thereby, with a violation of the provisions of the 5th section of an act entitled "An act regulating the issuing and taking up of tickets

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and coupons of tickets by common carriers, and defining the rights of holders thereof, and other matters in relation thereto," approved March 9th, 1875. 1 R. S. 1876, 259.

It is earnestly insisted by the appellant's counsel, that the entire statute is unconstitutional and void, upon the following grounds:

1. Because it is in violation of section 8 of article 1 of the Constitution of the United States, which provides: "The Congress shall have power:— * * * "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes." 2. Because "it is also an infraction of at least two provisions of the Constitution of Indiana." "1. It impairs the obligations of contracts;" * * * "2. It undertakes to grant to carriers of passengers privileges and immunities which it does not extend to other citizens upon the same terms, or upon any terms whatever."

We will consider the appellant's objections to the constitutionality and validity of the statute, in the inverse of the order in which his attorneys have presented them. We have already given the title of the act, and for the purpose of convenient reference we will set out the entire statute, in this connection, as follows:

"SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That it shall not be lawful, from and after the taking effect of this act, for any officer or agent of any railroad company, steamboat, or other public conveyance of passengers for hire or reward, or for the operator or operators, manager or managers (or his or their agent or agents), of any such railroad, steamboat or other public conveyance, to issue or sell any pass, ticket, or coupon of a ticket, or certificate evidencing the holder's right to travel over or be transferred in or upon such railroad, steamboat or other public conveyance, subject to any condition contained in or indorsed upon, or appended to such pass, ticket, coupon or certificate, whereby the liability of such carrier shall be abridged or limited, or whereby the rights of the holder of such pass, ticket, coupon or certificate shall be decreased or abridged, unless such condition shall be printed in nonpareil type, or in type or characters as large or larger than nonpareil type. Any such officer, agent, operator or manager, or the agent of such operator or manager, who shall violate the provisions of this section of the act, shall, upon conviction thereof, be fined not less than ten dollars, nor more than one hundred dollars, for each pass, ticket or coupon which he shall

issue or sell, contrary to the provisions of this section: *Provided, however,* That nothing herein shall be held or construed to change or in any manner affect the law as it now exists, regulating the liability of common carriers, or to enlarge their right to limit, or restrict their liabilities on account of having such attempted limitation printed as required by this act.

"SEC. 2. That it shall be the duty of the owner or owners, or operator or operators, of every railroad and steamboat or other public conveyance for the transportation of passengers for hire, or reward, to provide each agent, who may be authorized to sell tickets or other certificates evidencing the right of the holder thereof to travel or be transported upon such railroad, steamboat or other public conveyance, with a certificate setting forth the authority of such agent to make such sales, which certificate shall be signed by the managing officer, and duly attested by the corporate seal of the owner or operator of such railroad, steamboat or other public conveyance.

"SEC. 3. It shall be the duty of the owner or owners, operator or operators, of every railroad, steamboat or other public conveyance of passengers for hire or reward, to provide at each agency, for the sale of tickets, for the redemption of the whole of any ticket or any part or parts, or coupon of any ticket, which they may have sold, and which the purchaser, for any reason, shall not have used, at the following rates, namely: when the whole ticket is presented for redemption, at the full price paid for the same, and when a part or coupon of the ticket only is presented for redemption, then the redemption shall be at a rate which shall be equal to the difference between the price paid for the whole ticket and the cost of a ticket between the points for which the part of said ticket was actually used; and the sale, by any person, of the unused portion of any ticket, otherwise than by the presentation of the same for redemption as aforesaid, shall be deemed to be a misdemeanor, and shall be punished by a fine of not less than five dollars, nor more than fifty dollars: *Provided, however,* that this act shall not prohibit any person who shall have purchased a ticket from an agent, authorized as by this act provided, with the *bona fide* intention of travelling on the same, from selling such ticket, or any part or coupon thereof, to any other person, to be used in good faith by such person in travelling over such railroad, or in or upon such steamboat, or other public conveyance.

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"SEC. 4. If any owner, operator or manager of any railroad, steamboat or other public conveyance of passengers, or his agent, shall violate any of the provisions of the third section of this act, he shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined not less than ten, nor more than one hundred dollars.

"SEC. 5. It shall not be lawful for any person, not possessed of the authority mentioned in the second section of this act, and not evidenced as therein provided for, to sell, barter or transfer, within this State, for any consideration whatever, the whole or any part of any ticket or tickets, passes or other evidence of the holder's title to travel on, or be transported in, or over any railroad, steamboat or other public conveyance, whether the same be situated, owned or operated within or without this State, except as provided for in section 3.

"SEC. 6. It shall be the duty of every agent who shall be authorized to sell tickets or parts of tickets, or coupons, as is provided for in the second section of this act, or other evidences of the holder's title, to travel on any railroad, or in any steamboat or public conveyance, to keep his certificate of authority posted in a conspicuous place in his office, and also to exhibit the same to any person desirous of purchasing a ticket, or to any officer of the law who may request to see or inspect such certificate of authorization.

"SEC. 7. Any person who shall violate any provisions of either the fifth or sixth sections of this act shall, upon conviction thereof, be fined not less than ten, nor more than one hundred dollars.

"SEC. 8. The provisions of this act shall not apply to special, half-fare or excursion tickets."

It is the settled doctrine of the decisions of this court, that "the legislative authority of this State is the right to exercise supreme and sovereign power, subject to no restrictions except those imposed by our own Constitution, by the Federal Constitution, and by the laws and treaties made under it. This is the power under which the legislature passes all laws." *Beauchamp v. The State*, 6 Blackf. 299; *Doe v. Douglass*, 8 id. 10; *The Lafayette, etc., R. R. Co. v. Geiger*, 34 Ind. 185. It must appear very clearly, that the legislation is in conflict with some express provision of the Constitution, or the statute will be upheld.

It is claimed by the appellant that the statute above quoted is in conflict with that provision of the Bill of Rights which declares

that no law shall ever be passed "impairing the obligation of contracts." We fail to see this matter in the light in which the appellant's counsel have presented it. But if it could be said that the statute did impair the obligation of contracts existing at the time of its passage, the effect would be, as it seems to us, that as to such existing contracts, the statute would be inoperative and of no effect; while it might be and would be, if no other objection existed, constitutional and valid as to all future contracts. The transaction, on which the indictment in this case was predicated, occurred nearly four years, as alleged, after the passage of the act in question, and it cannot be said, we think, that the statute impaired the obligation of any contract in connection with that transaction. This objection to the constitutionality of the statute was not well taken, and cannot be sustained in any view of the question.

The second objection urged by the appellant, to the validity of the statute, under our State Constitution, is, that it is in conflict with that section of the Bill of Rights which declares that "The general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

In discussing this objection, the appellant's counsel say of the statute: "It grants to any common carrier the exclusive right to purchase the unused portion of its tickets, and does not, under any circumstances, permit any other person to engage in the purchase thereof, and extends to said carriers immunity from all competition in the purchase and sale of such tickets. It simply is enabling a monopoly to be more exclusive."

We do not think that this is a fair statement of the purport and effect of the statute. It does not grant a right to, but imposes a duty upon, the common carrier of passengers to purchase the unused portion of its tickets. It does not prevent, but expressly allows, the sale by the *bona fide* holder of such unused portions of tickets to any other person, to be used by such person in good faith in travelling therewith. It prohibits a general brokerage business in the buying and selling of such unused portions of tickets, except under certain well-defined restrictions. The provisions of the statute in this regard are manifestly police regulations; and whatever may be said, either for or against the justice or the wisdom of these regulations, it is certain, we think, that in their enactment, the legislature did not exceed their legitimate power under our

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State Constitution. It is neither the province nor the duty of the courts to call in question either the policy or the wisdom of any act of legislation. The learned attorneys of the State have stated clearly and explicitly, in their argument of this cause, some of the motives which may possibly have induced the general assembly to enact the statute now under consideration. Without indorsing in anywise this statement, it may not be improper for us to set it out, in this connection, as a statement of the views of the representatives of the State in this prosecution, as to the probable reasons for the enactment of this statute.

Counsel say: "If the legislature believed that spurious tickets were being put upon the market by means of brokers, of such kind as to make detection difficult, and in such numbers as to amount to a serious injury to the people or the railroad companies, or if they believed that their offices furnished a market for stolen tickets, and aided employees of the railroads, or other persons, in carrying on a nefarious business, and a business dangerous both to the railroads and their patrons, and if they further believed that the brokers were of little or no advantage to anybody, then they might well enact such a statute as this, as the best means of correcting an existing evil. And if it seemed wiser to the legislature to strike directly at the brokers, and make their business unlawful, than to attempt to punish those who stole genuine or issued spurious tickets, they had the same right to take that course that they have to make a man a criminal, who rents a house for gaming purposes, and thus assists gamblers, who are also criminals, in preying upon society."

In our opinion, the statute under consideration is not open to the second objection urged by the appellant's counsel against its validity, under the provisions of our State Constitution.

We pass now to the consideration of the main ground of objection, presented by the appellant's attorneys to the constitutionality and validity of the statute above quoted, namely, that it is in violation of section 8 of the first article of the Constitution of the United States, which provides:

"The Congress shall have power:— * * * * To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

In discussion this second objection to the statute under consideration, the appellant's counsel lay down the following propositions,

with the purpose of establishing the same, in and by their argument:

“I. That the word ‘commerce,’ as used in this section of the Constitution, includes passenger travel, and hence any regulation of passenger travel is a regulation of commerce.

“II. That the power vested in Congress to regulate commerce, as applied to inter-State passenger travel, is exclusive, and that the States have no power whatever to legislate upon this subject, even in the absence of legislation upon the part of Congress.

“III. That conceding that the right to regulate commerce exists in the States until Congress has exercised its powers in that behalf, Congress has so far exercised that power as to preclude any action on the part of the States.

“IV. That the statute does attempt to regulate passenger travel among the States, and hence is void; and

“V. That such statute is not a legitimate exercise of the police power which confessedly resides in the several States.”

We need not in this opinion consider or comment upon any of these propositions of the appellant’s counsel, except the fourth and fifth. We do not think that the first three of the five propositions laid down by counsel are in any manner involved in the case now before us. We recognize the Constitution of the United States, and the acts of Congress pursuant thereto, as the supreme law of the land.

It may be conceded that the word “commerce,” as used in section 8, above quoted, of the first article of the Federal Constitution, includes within its scope and meaning inter-State passenger travel; and that the power vested in Congress to regulate commerce, as applied to such travel, is so far exclusive in its character, as that the States may not, by any act of legislation, impose burdens upon either the carrier or the passenger, which would obstruct or hinder the free course of travel. Such we understand to be the purport and effect of the decisions of the Supreme Court of the United States, in construing the section above quoted. *Gibbons v. Ogden*, 9 Wheat. 1; *Passenger Cases*, 7 How. 283; *Henderson v. The Mayor, etc.*, 92 U. S. 259; *Chy Lung v. Freeman*, id. 275; *Railroad Co. v. Husen*, 95 id. 465. In these cases the doctrine is firmly maintained, that Congress has the exclusive power to regulate commerce, including inter-State passenger travel; and in the case last cited, the court defines the term “commerce,” and what is meant by a regulation of commerce, as follows: “Transportation is essential to

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commerce, or rather it is commerce itself ; and every obstacle to it, or burden laid upon it by legislative authority, is regulation."

From this definition of the term "regulation," as applied to commerce, it would seem that a State statute, which placed no obstacle in the way of, and imposed no burden upon, inter-State passenger travel, could not be said to "invade the domain of the National government," and could not, for that reason, be held to be unconstitutional and void. It cannot be said, we think, that the statute of this State, above quoted, in any manner impedes, obstructs or casts any burden upon the free course of commerce, in so far as inter-State passenger travel is concerned. The statute imposes certain prescribed duties upon common carriers of passengers and their agents, but the discharge of these duties does not and cannot, as it seems to us, obstruct or hinder, or cast any burden upon, the commerce of the country or inter-State passenger travel. The act absolutely prohibits and makes unlawful the sale, barter or transfer, within this State, by any person not authorized thereunto as provided in said act, for any consideration whatever, of the whole or any part of any ticket or tickets, passes, or other evidences of the holder's right to travel, etc. Thus far forth, the provisions of the statute must be regarded, as we have already said, as police regulations, the evident object and purpose of which were to prevent and prohibit a general brokerage business in the purchase and sale of such tickets, etc., and the unused portions thereof. We fail to see that these regulations are obstacles to, or burdens upon, inter-State commerce, in any sense of that term.

In the case of *Railroad Co. v. Husen*, *supra*, the Supreme Court of the United States say :

"We admit that the deposit in Congress of the power to regulate foreign commerce and commerce among the States was not a surrender of that which may properly be denominated police power. What that power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety. * * * It may also be admitted that the police power of a State justifies the adoption of precautionary measures against social evils. Under it a State may legislate to prevent the spread of crime, or pauperism, or disturbance of the peace."

If in the exercise of its police power, a State enacts certain regulations, which are neither obstacles to, nor burdens upon, inter-

State commerce, it cannot be said, we think, that such legislation "invades the domain of legislation which belongs exclusively to the Congress of the United States," merely because it relates to subjects which, to some extent, are connected with inter-State commerce. For as we understand the decision of the Supreme Court of the United States in the case last cited, the State legislatures are prohibited, by said section 8 of the first article of the Federal Constitution, from enacting such regulations only, in relation to inter-State commerce, as would be either obstacles to, or burdens upon, such commerce. If this view of the matter under consideration is correct, and we think it is, it follows very clearly that the statute of this State, above quoted, is not "in violation of section 8, article 1 of the Constitution of the United States," and is not, therefore, unconstitutional and void.

In the same section of the same article of the Constitution of the United States, it is provided, that "the Congress shall have power : * * * *

"To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

The power thus given was early exercised, and since has been continuously exercised, by Congress in the enactment, from time to time, of suitable laws, for the purposes indicated. The power thus exercised is just as exclusive, in its origin and nature, as the power to regulate foreign or inter-State commerce. In *Ex parte Robinson*, 2 Biss. 309, it was held by DAVIS, J., then an eminent and learned justice of the United States Supreme Court presiding in the United States Circuit Court in this district, as follows :

"The property in inventions exists by virtue of the laws of Congress, and no State has a right to interfere with its enjoyment, or to annex conditions to the grant. If the patentee complies with the law of Congress on the subject, he has a right to go into the open market anywhere within the United States and sell his property."

This court adopted and followed the doctrine of the case cited, in *Helm v. The First National Bank of Huntington*, 43 Ind. 167, and in *The Grover & Baker Sewing Machine Co. v. Butler*, 53 id. 454.

In the recent case of *Patterson v. Kentucky*, 97 U. S. 501,* decided by the Supreme Court of the United States in February,

* See 26 Am. Rep. 517, note.

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1879, the exclusive power of Congress to legislate on the subject of property in inventions was claimed by the plaintiff in error, and that a statute of Kentucky, which imposed a fine on any one who should sell for certain purposes a certain patented article, possessed of certain qualities, was unconstitutional and void, because it was inconsistent with the Federal Constitution, and the laws of Congress pursuant thereto. In an able and exhaustive opinion, Mr. Justice HARLAN lays down the doctrine, in that case, that "obviously," the right of a patentee, under the Constitution and laws of the United States, "is not granted or secured, without reference to the general powers which the several States of the Union unquestionably possess, in reference to their purely domestic affairs, whether of internal commerce or of police." The learned judge quotes with approval, and to some extent grounds his opinion upon, the following excerpts from Mr. Cooley's excellent Treatise on Constitutional Limitations, to wit :

"In the American constitutional system, the power to establish the ordinary regulations of police has been left with the individual States, and cannot be assumed by the National government. * * * If the power extends only to a just regulation of rights, with a view to the due protection and enjoyment of all, and does not deprive any one of that which is justly and properly his own, it is obvious that its possession by the State, and its exercise for the regulation of the property and actions of its citizens, cannot well constitute an invasion of National jurisdiction, or afford a basis for an appeal to the protection of the National authorities." Page 574.

In the case cited, it was held by the Supreme Court of the United States, that the Kentucky statute was a police regulation within the power of the State, and was not in violation of the Constitution and laws of the United States. We have cited the case, in this connection, not because it is directly in point, but because it contains the latest expression we have seen of the views of the Supreme Court of the United States upon subjects which are, at least, closely allied to the questions involved in this case. Of course, in so far as the doctrine of the case cited is in conflict with the decisions of this court, in the cases above cited, or any other cases in our Reports, the latter cases must be and are overruled.

In the case at bar, our conclusion is, that the statute of this State, above quoted, is not in conflict with the Constitution or laws of the United States, but was a legitimate exercise by the State legislature

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of the police powers of the State. Therefore, we hold that no error was committed by the court below, in overruling the appellant's motion to quash the indictment.

No point is presented for decision, by the appellant's counsel in argument, arising under the alleged error of the court in overruling the appellant's motion for a new trial. That error, even if it existed, must therefore be regarded as waived.

The judgment is affirmed, at the appellant's costs.

Judgment affirmed.

 GILCHRIST V. GOUGH.

(63 Ind. 576.)

Deed — purchaser — registry — mistake in — effect of index.

An index of the record of conveyances, by law required to be kept by the public recorder, but in which he is not required to state the amount of the consideration of instruments recorded, is not notice to a purchaser for a valuable consideration of such amount, although it state it. The same is true of an entry book. So where a mortgage is entered and indexed, correctly stating the amount, but in the record the amount is stated less, a subsequent purchaser for a valuable consideration, not knowing of the former mortgage, is bound only by the record, although he knew of the statement in the index.*

A creditor who takes a mortgage in consideration of the extension of the time of payment of a pre-existing debt is a purchaser for a valuable consideration.

SUIT for foreclosure. The opinion states the facts.

J. C. McIntosh, M. E. Forkner and E. H. Bundy, for appellant.

J. Brown, S. H. Buskirk and J. W. Nichol, for appellees.

Howk, C. J. This was a suit by the appellant, as plaintiff, against the appellees, as defendants, for the foreclosure of a certain mortgage, and the recovery of the mortgage debt.

[Omitting superfluous statements.]

As necessary to a proper understanding of this cause, and of the important and controlling questions therein, and of our decision

*See note, 26 Am. Rep. 309.

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of those questions, we will first give a summary of the facts of the case as we gather the same from the record. On the 1st day of March, 1869, the defendants, Charles T. Gough and Mary O., his wife, executed to the appellant the mortgage described in his complaint in this action, conveying to him the real estate in Henry county, particularly described in said mortgage, as security for the payment of a debt of five thousand dollars, evidenced by the promissory note of said Charles T. Gough, of even date with said mortgage, payable three years after its date, to the appellant, with interest thereon at the rate of nine per centum per annum. The consideration of said note and mortgage was the loan of five thousand dollars, by the appellant, to said Charles T. Gough.

On the 15th day of May, 1871, the appellant left the said mortgage for record, with the recorder for Henry county, at the recorder's office of said county. The recorder entered the mortgage in the "Entry Book" of his office, in the appropriate columns thereof, showing the exact date and hour the mortgage was left with him, the date and character of the instrument, the names of the grantor and grantee therein, and the book and page, of his office, on which the mortgage was recorded. The mortgage was recorded on the day last named, in the proper mortgage record of the recorder's office of said county; but in recording the mortgage in this record, the recorder, by mistake or oversight, wrote the words "five hundred dollars," instead of the words "five thousand dollars," which latter words were the words in the original mortgage; so that the record of the mortgage only showed a mortgage to the appellant, from Charles T. Gough and his wife, for five hundred dollars, instead of showing a mortgage for five thousand dollars, as the fact was, which the record of the mortgage ought to have shown. After the mortgage had been thus recorded, the original mortgage was delivered to the appellant and was by him taken away from the recorder's office, neither he nor the recorder having discovered, or having any knowledge of the mistake which had been made in the record of said mortgage.

In the "Index of Mortgages," in the recorder's office of said county, the mortgage was entered, specifying in a column thereof, provided for that purpose, that said mortgage was for five thousand dollars.

On the 10th day of February, 1874, the said Charles T. Gough and his wife executed a mortgage, conveying to the appellee Jacob V. Hoffman the same real estate described in the appellant's said

mortgage to secure the payment of a debt evidenced by the note of said Charles T. Gough, of even date with said mortgage, for the sum of thirty-five hundred dollars, payable twelve months after the date thereof, to said Jacob V. Hoffman, with ten per cent interest from date. This mortgage was duly recorded in the recorder's office of said Henry county, on the 9th day of May, 1874.

On the 10th day of July, 1874, the said Gough and his wife executed another mortgage, conveying to the appellee Hoffman the same real estate, as security for the payment of another note of the same date with said mortgage, executed by said Charles T. Gough, and payable twelve months after date to said Hoffman, with ten per cent interest from date. This latter mortgage was also recorded in the recorder's office of said county on the ——— day of ———, 1874.

The consideration of each of the said two notes executed by said Gough to said Hoffman was the prior indebtedness of the former to the latter, for money loaned and goods sold and delivered, to an amount in excess of the aggregate amount of said two notes, and the extension of time or credit given by each of said notes for the payment of the amount thereof.

At the times when the appellee Hoffman took and received his said two mortgages from Gough and his wife, on said real estate, he had no notice nor knowledge, actual or constructive, of the appellant's prior mortgage thereon, or of the amount of said mortgage, except such as he had obtained, or might have obtained, from the records of the recorder's office of said Henry county.

Upon the foregoing facts, the question presented for decision in the language of appellant's counsel in their argument of this cause in this court, is "the one single question of the priority of the mortgages." The learned counsel then say: "This question involves three other questions:

"1. Was Hoffman, under the above statement of facts, a *bona fide* purchaser or mortgagee, for value?

"2. Where a mortgage is properly filed in the recorder's office, and properly entered in the 'entry book,' but is afterward, by mistake, misrecorded without the fault of the mortgagee, does it take priority over a subsequent *bona fide* mortgage, upon a valuable consideration, without notice?

"3. Was the actual knowledge that the mortgage was indexed as one for \$5,000, sufficient to put the subsequent mortgagee on in-

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quiry, and charge him with notice of the mistake in the record and of the true amount of the mortgage?"

We will consider and decide these several questions in the same order in which counsel have numbered them.

1. It is conceded by the appellant's attorneys, that by the law as stated by this court in the case of *Work v. Brayton*, 5 Ind. 396, the appellee Hoffman was a *bona fide* purchaser or mortgagee for value, and we are asked to reconsider the doctrine of that case, that a mortgage of real estate, given to secure a precedent debt, is founded upon a valuable consideration. Upon this point, the case cited has been approved by this court in a number of more recent decisions. *Nutter v. Harris*, 9 Ind. 88; *Wright v. Bundy*, 11 id. 398; *McMahan v. Morrison*, 16 id. 172; *Babcock v. Jordan*, 24 id. 14; and *Brannon v. May*, 42 id. 92.

On the point now under consideration the cases cited have never been expressly overruled; but the doctrine of those cases was modified by this court, in the later case of *Busenbarke v. Ramey*, 53 Ind. 499, to such an extent as to virtually overrule the previous cases. In the case last cited, it was held, in substance, and we think correctly, that the mortgagee who takes a mortgage to secure a pre-existing debt, the time of payment not being extended, or no securities being surrendered, or nothing of value being parted with, is not a purchaser for a valuable consideration, within the meaning of that expression as used in the law. In support of this doctrine, in addition to the authorities cited in the case of *Busenbarke v. Ramey*, *supra*, we cite the following: 2 White & Tudor's Lead. Cas. in Eq., part 1, p. 83, *et seq.*; *Johnson v. Graves*, 27 Ark. 557; *Ashton's Appeal*, 73 Penn. St. 153; and *Cary v. White*, 52 N. Y. 138, 141.

It will be readily seen, however, from our statement of the facts of this case, that under the law as we have stated it, the appellee Hoffman must be regarded as a purchaser or mortgagee, for a valuable consideration, as to each of his said mortgages. For it appeared that, in each of said mortgages, the time of payment of the pre-existing indebtedness, to secure which the mortgage was given, had been extended for the term of one year, and this extension of time, as we have seen, was sufficient to make him a purchaser or mortgagee for a valuable consideration, as to each of the mortgages.

2. In section 16 of "An act concerning real property and the alienation thereof," approved May 6th, 1852, it is provided, in sub-

stance, that every mortgage or conveyance of land, or of any interest therein, and every lease for more than three years, shall be recorded in the recorder's office of the county where such land shall be situated; and every conveyance or lease, not so recorded in forty-five days from the execution thereof, shall be fraudulent and void as against any subsequent purchaser, lessee or mortgagee in good faith and for a valuable consideration. 1 R. S. 1876, p. 365. The mortgage to the appellant, described in his complaint, was not recorded in the recorder's office of Henry county, until long after the expiration of the time, then ninety days, within which the statute required that it should be recorded. It has been repeatedly decided by this court, however, that the record of a conveyance, not recorded within the period of time limited by the statute, but after the expiration of that time, would constitute notice to all purchasers after the conveyance had been placed upon record. *Meni v. Rathbone*, 21 Ind. 454; *Runyan v. McClellan*, 24 id. 165; *Trisler v. Trisler*, 38 id. 282; *Brannon v. May*, 42 id. 92.

It will be seen from our statement of the facts of this case, that the appellant's mortgage was recorded in the proper recorder's office, more than two years before either of the two mortgages held by the appellee Hoffman had been executed. It is not questioned, therefore, that the record of the appellant's mortgage constituted notice to the appellee Hoffman, at the time he took his said two mortgages on the same real estate covered by the appellant's mortgage. Such record of said mortgage, however, was only notice, whether actual or constructive, of the existence and record of the mortgage and of the contents of such record. This proposition is so manifestly true and correct, that the appellant's counsel, as we understand them, do not call it in question. It is claimed, however, as will be seen from the second question, above set out, of the appellant's attorneys, that where a mortgage has been properly filed for record in the recorder's office, and properly entered in the "entry book" of said office, but has been afterward, by mistake, erroneously recorded, without any fault of the mortgagee, such mortgage would take priority of a subsequent *bona fide* mortgage upon a valuable consideration, without notice.

It seems to us that the second question, as stated by counsel, does not accurately present the precise point intended to be presented thereby. The position of the appellant's attorneys on the point under consideration, if we correctly understand them, is

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this : Where a mortgage has been properly filed for record, and properly entered in the "entry book" of the proper recorder's office, and afterward, by mistake and without any fault of the mortgagee, has been erroneously recorded, every subsequent *bona fide* purchaser or mortgagee, for a valuable consideration, is affected by law with notice of the actual contents of the mortgage itself, without regard to the contents of the record of the mortgage. In support of this position, counsel rely upon the provisions of section 29 of the act before referred to, concerning real property and the alienation thereof, which section reads as follows :

"SEC. 29. Every recorder of deeds shall keep a book, each page of which shall be divided into five columns, headed as follows, to wit :

Date of reception.	Names of grantors.	Names of grantees.	Description of lands.	Volume and page where recorded.
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" And the recorder shall enter in said book all deeds and other instruments left with him to be recorded ; noting in the first column the day and hour of receiving such deed or instrument, and the other particulars in the appropriate column ; and every such deed or instrument shall be deemed as recorded at the time so noted." 1 R. S. 1876, p. 367.

It seems to us that this section of the statute does not sustain the position of the appellant's attorneys, as we understand their position. It is true that under this section, every deed or instrument left with the proper recorder for record, "shall be deemed as recorded" at the day and hour the recorder shall enter the same in the "entry book" of such recorder's office. The record made in this "entry book," under the law, is notice only of those matters which the statute requires shall be entered in the different columns of said book. It is not, and was not intended to be, notice of any act, matter or thing of which the statute does not, in express terms, require an entry to be made in the appropriate column of said "entry book." The entries there made of the matters specified in the statute are notice of those matters, and no others, to all parties interested. They are notice of the existence of the deed or other instrument, of the exact date of its reception for record, of the parties thereto, grantors and grantees, and of the description of the lands to be affected thereby ; but the fact that an entry

must also be made of the volume and page where such deed or other instrument will be found of record shows very clearly, we think, that it never was intended that these entries in the "entry book" should be notice of the contents of such deed or instrument.

The appellant's counsel, in support of their position, have cited the case of *Kessler v. The State ex rel., etc.*, 24 Ind. 313. That was a suit on the official bond of Kessler, the recorder of Tipton county, to recover damages for an alleged failure to discharge his official duty. The breach assigned was that the recorder had wholly failed to record a certain chattel mortgage, which had been left with him for record, by means whereof the mortgagee had lost his mortgage debt. The appellee's relator had judgment below, and on appeal to this court, the record showing that the recorder had made the proper entries in relation to said mortgage, in the "entry book" of his office, the judgment was reversed. The decision was founded upon said section 29, before cited, of the act concerning real property and the alienation thereof. The section cited was not applicable to a mortgage of chattels, and the decision of the court in that case cannot be sustained. The case cited is overruled.

There is a wide and marked difference, however, between a case where there has been no record made of a mortgage, other than the proper entries in relation thereto, in the "entry book" of the proper office, and the case where, as in the case at bar, the mortgage has been recorded, but by mistake of the recorder, and without any fault of the mortgagee, it has been erroneously recorded. The former case is not presented by the record of this cause, and we need not and do not decide what would be the effect of the entries in the "entry book" of the appellant's mortgage, if no other record of said mortgage had been made in the proper recorder's office.

In the entries in the "entry book" in the recorder's office of Henry county, in relation to the appellant's mortgage, reference is made, in the appropriate column, to the volume and page where said mortgage was recorded. It was there recorded, by the recorder's mistake and without the appellant's fault, as a mortgage for five hundred dollars, instead of for five thousand dollars as in the original mortgage. There was nothing in the entries in the "entry book," in relation to said mortgage, to indicate that it had been given for any other or different sum than the sum of five hundred dollars, as expressed in the record of said mortgage.

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The record of the mortgage alone affected the appellee Hoffman with notice of the mortgage, and of the contents of such record. As to Hoffman, who was, as we have seen, a mortgagee in good faith and a valuable consideration, it seems clear to us that the record of the appellant's mortgage was notice only to the extent of five hundred dollars, the sum expressed in such record, and interest thereon. In support of this conclusion, and for the benefit of those who may wish to examine them, we cite in this connection the following authorities, for which we are indebted to the industry of the learned attorneys of the appellee Hoffman: *Frost v. Beekman*, 1 Johns. Ch. 288; *Beekman v. Frost*, 18 Johns. 544; *The New York Life Ins. Co. v. White*, 17 N.Y. 469; *Jennings v. Wood*, 20 Ohio, 261; *Brown v. Kirkman*, 1 Ohio St. 116; *Sawyer v. Adams*, 8 Vt. 172; *Sanger v. Craigie*, 10 id. 555; *Luch's Appeal*, 44 Penn. St. 519; *Speer v. Evans*, 47 id. 141; *Schell v. Stein*, 76 id. 398; *Miller v. Bradford*, 13 Iowa, 14; *Barney v. McCarty*, 15 id. 510; *Lally v. Holland*, 1 Swan, 396; *Shepherd v. Burkhalter*, 13 Ga. 443; *Chamberlain v. Bell*, 7 Cal. 292; *Barnard v. Campau*, 29 Mich. 162; *Terrell v. Andrew County*, 44 Mo. 309; *Brydon v. Campbell*, 40 Md. 331.

3. The third question stated by the appellant's counsel as involved in the record of this cause, was this: "Was the actual knowledge that the mortgage was indexed as one for \$5,000 sufficient to put the subsequent mortgagee on inquiry, and charge him with notice of the mistake in the record and of the true amount of the mortgage."

We have two statutes in this State which provide for indexes to the records of the recorder's office in each county. In section 1 of an act authorizing recorders to make out complete or general indexes, etc., approved February 16th, 1852, it is provided that "such index shall be double, giving the name of each grantor and grantee alphabetically, a concise description of the premises, the date of the deed, together with the number or letter of the book, and the page in which each deed is recorded." 1 R. S. 1876, p. 757.

In section 3 of "An act to provide for the election, and prescribing certain duties of recorder," approved May 31st, 1852, it is provided that the recorder shall make a complete index of all the instruments recorded, for each volume, which should contain "The name of each grantor, promisor or covenantor in alphabetical order referring to the proper grantee, promisee or covenantee, and

also the name of each grantee, promisee or covenantee in the same order, referring to the proper grantor, promisor or covenantor." 1 R. S. 1876, p. 759.

It will be seen from these provisions, that the recorder is not required by law to note in any indexes the amount of any mortgage recorded in his office. Therefore, it seems to us that a memorandum of the amount of a mortgage, made by a recorder in any index of his office, is not notice, actual or constructive, of any matter which other persons are bound to take notice of. The object of an index to records is to point out the book and page in which a particular record may be found; and if a person should find that there was a discrepancy or variance between the index to the record and the record itself, as to a matter which the record was obliged to contain, and the index was not required to contain, we think that he might well and reasonably conclude that the record was right and the index was wrong, without any further inquiry. Such discrepancy or variance would certainly not be sufficient to charge a subsequent mortgagee in good faith and for a valuable consideration with notice that the index was right and the record was wrong, or of the true amount of the mortgage.

What we have hitherto said in this opinion disposes of all the errors assigned by the appellant, which call in question the decisions of the Circuit Court on the pleadings. There was no error in any of those decisions. The fact that the appellant's mortgage was entitled to priority over the mortgages of the appellee Hoffman, to the extent of the amount shown in and by the record of the appellant's mortgage, was a fact recognized by said appellee in his pleadings, and acted upon by the court in its decisions, both in overruling the appellant's demurrers to the appellee's answers and cross-complaint, and in sustaining appellee's demurrers to the appellant's replies.

We think it is unnecessary for us to set out even the substance of any of these pleadings. They were intended to, and did, fairly present the precise questions which have been fully considered in this opinion.

Under the alleged error of the Circuit Court in overruling the motion for a new trial, the counsel of the appellee Hoffman have briefly discussed in argument several alleged errors of law occurring at the trial, in the introduction of evidence and in giving and refusing to give certain instructions to the jury trying the cause. We

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have carefully examined and considered each and all of these alleged errors of law, and have been led to the conclusion that none of them are well assigned, or available to the appellant for a reversal of the judgment below.

After a careful and thorough examination of the record of this action and upon full consideration of the able and exhaustive briefs of the learned counsel of the respective parties, it has seemed clear to us "that the merits of the cause have been fairly tried and determined in the court below."

In such a case the statute forbids that the "judgment be stayed or reversed, in whole or in part." 2 R. S. 1876, p. 246, § 580.

The judgment is affirmed at the costs of the appellant.

Petition for a rehearing overruled.

Judgment affirmed.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

MIX V. ANDES INSURANCE COMPANY.

(74 N. Y. 53.)

Removal of cause — corporation — affidavit — bond.

A corporation of another State sued here may remove the cause into the Federal court, and its authorized agent may make the requisite affidavit.* On petition for removal of a cause to the Federal court, the State court may determine whether the bond is "good and sufficient," but cannot arbitrarily reject one good in form; and technical objections to the affidavit must be taken when the affidavit is read below, or are deemed waived.

ACTION on a fire insurance policy. The opinion states the facts. The plaintiff had judgment below.

W. F. Cogswell, for appellant.

Daniel Pratt, for respondent, cited U. S. R. S. 113; *Bowen v. Chase*, 7 Blatchf. 255; *Getty v. Binsse*, 49 N. Y. 385; s. c., 10 Am. Rep. 379; *Risley v. Brown*, 67 id. 160; *Roberts v. Canington*, 3 Hall, 650; *Bell v. Lyc. Ins. Co.*, 3 Hun, 410; *Hadden v. Putnam F. Ins. Co.*, 46 N. Y. 1; *Cooke v. State Nat. Bk.*, 52 id. 96; s. c., 11 Am. Rep. 667; Laws 1869, ch. 133, p. 241.

EARL, J. This action was commenced by the plaintiff against the defendant, an Ohio corporation, to recover upon a fire policy.

* See contra, *Mahome v. Manchester & Lawrence R. R. Co.* (111 Mass. 72); 15 Am. Rep. 9; *Quigley v. Cent. Pacific R. R. Co.* (11 Nev. 350), 21 Am. Rep. 757.

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It was claimed upon the trial that this cause had been removed into the United States Circuit Court, under the act of Congress approved March 2, 1867 (14 U. S. Statutes at Large, 558), and this claim must be first examined. That act provides that when an action is brought in any State court "in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, and the matter in dispute exceeds the sum of \$500, exclusive of costs, such citizen of another State, whether he be plaintiff or defendant, if he will make and file, in such State court, an affidavit stating that he has reason to and does believe, that from prejudice or local influence, he will not be able to obtain justice in such State court, may, at any time before the final hearing or trial of the suit, file a petition in such State court for the removal of the suit into the next Circuit Court of the United States to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of all process, etc., and it shall be thereupon the duty of the State court to accept the surety and proceed no further in the suit."

Under that act, before the answer was served in this action, the defendant filed a petition setting forth the facts required by the act and praying for a removal of the cause into the United States Circuit Court. The petition was signed in the name of the company by the president and he verified it. At the same time there was filed the affidavit of the president of the company, stating that "he has reason to believe, and does believe that from prejudice and local influence said company will not be able to obtain justice in this court." There was also filed a bond, signed by the defendant and one Cramer, to the purport and effect required by the act.

Upon the petition, affidavit, and bond, the defendant moved, upon notice to the plaintiff at special term of the Supreme Court, for the removal of the cause, and the motion was denied. It does not appear upon what ground the plaintiff objected to the removal nor upon what ground it was denied by the court.

The defendant set up in his answer and insisted upon the trial that the cause had been removed, and that the court had thus lost jurisdiction of the action. But the court retained jurisdiction, and proceeded in the action to judgment. Upon appeal to the General Term by the defendant, the jurisdiction of the Supreme Court was maintained upon the sole ground that the act of 1867 did not ap-

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ply to the case of a corporation asking for the removal of a cause, for the reason that a corporation could not make an affidavit as required by that act.

It is not questioned that the defendant, although a corporation, was a citizen of the State of Ohio. But the claim is that the statute requires the affidavit to be made by the party, and as a corporation cannot make an affidavit, it cannot have the benefit of the statute. It is true, that literally speaking, a corporation cannot believe, nor have motives or knowledge. Yet a corporation can legally entertain malice, be guilty of fraud, libel and other torts. Notice to its managing agents is notice to it; and their motives and knowledge and belief may be attributed to it. We do not think there was any purpose in the phraseology used to exclude corporations from the benefit of the act. A corporation could make the required affidavit, as it would do any other act, by its authorized agent, and this view is sanctioned by respectable authority. *Insurance Company v. Dunn*, 19 Wall. 214; *Farmers' Loan, etc., Company v. Maquillan*, 3 Dill. 379; *Minnett v. Milwaukee and St. Paul Railway Co.*, id. 460; *Shaft v. Phoenix Insurance Co.*, 67 N. Y. 544; s. c., 23 Am. Rep. 138.

The case of *Cooke v. State National Bank*, 52 N. Y. 96; s. c., 11 Am. Rep. 667, was relied upon by the court at General Term for its decision, and in form it was held in that case that a corporation could not make the affidavit required by the act of 1867, and hence could not avail itself of the benefit of that act. But that decision, as will be seen by the language used, was merely *pro forma*, to facilitate the final disposition of that case, and it was not intended to lay down a rule which would govern other cases.

But further objections to the removal of the cause are now made which do not appear to have been made at an earlier stage of the case. It is said that the court at Special Term had the right to deny the petition for the removal on account of the insufficiency of the bond. But the bond is sufficient in form. It is a joint obligation, and is signed by one surety who is a resident of the State. The statute does not prescribe the form in which the security shall be given, nor the amount thereof, except that the same shall "be good and sufficient." The court to which it is presented obviously must determine whether the security tendered is "good and sufficient." It could doubtless require that the bond should be joint and several; it could determine the amount thereof, and it could

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require more than one surety if one were insufficient, and it could require the sureties to justify. But it could not arbitrarily reject the bond tendered without specifying any cause. An orderly administration of justice requires that the defects should be pointed out, so that they could be remedied, and so it has been said in decided cases. *Taylor v. Shew*, 54 N. Y. 75; *Fisk v. Union Pacific R. R. Co.*, 6 Blatchf. 362, 380; *Bowen v. Chase*, 7 id. 255. This bond is sufficient in form and substance. Upon its face it is a precise compliance with the act, and in the absence of any specification to that effect, we cannot assume that the denial of the petition for the removal was on account of any insufficiency of the bond.

The petition and affidavit contain all the facts which the statute requires to be stated therein; but it is now objected that the affidavit which was made in the State of Ohio was not properly certified as required by chapter 133 of the Laws of 1869, so as to authorize it to be read upon the motion at Special Term. It is clear that it was not properly certified under the last-named act. But this again is an objection which should have been taken at the time the affidavit was read, and if not then taken it was waived. We cannot assume that it was then taken. There is nothing showing that it was, or that the motion for removal was denied on that ground. The order denying the motion recites that the papers upon which the motion was based were read, and those papers included the affidavit. If the affidavit had been objected to and rejected as insufficiently certified, it would not have been read. It was in form and substance all that the act of Congress required, and if there was a defect in the certification of the same under the State law, so that it could not be read, such defect could be and was by silence waived. The affidavit was not rejected, but was read, and yet the petition was denied.

It is quite obvious that the removal was denied upon the sole ground that a corporation could not have the benefit of the act of Congress. For reasons above stated that ground is not a valid one. The act of Congress therefore having been complied with, the cause was removed, and the Supreme Court had no jurisdiction thereafter to proceed further in the action.

The judgment must, therefore, be reversed, with costs to the defendant subsequent to its appearance in this action.

All concur, except CHURCH, C. J., and MILLER, J., not voting.

Judgment reversed.

WILKINSON V. GILL.

(74 N. Y. 68.)

Lottery — “playing policy.”

The purchase of a number which, if drawn, will entitle the holder to a large sum of money, is the purchase of an interest or share in a lottery, within the meaning of the statute.*

ACTION to recover money under a statute against lotteries. The opinion states the facts. The plaintiff had judgment.

Samuel Hand, for appellant.

E. H. Benn, for respondent.

CHURCH, C. J. This is an action to recover money under the following statute against lotteries: “Any person who shall purchase any share, interest, ticket, certificate of any share or interest, or part of a ticket, or any paper or instrument purporting to be a ticket, or share or interest in any ticket, or in any portion of any illegal lottery, may sue for and recover double the sum of money, and double the value of any goods or things in action which he may have paid or delivered in consideration of such purchase, with double costs of suit.” 1 R. S. 667, § 32.

The only evidence in the case was that of the plaintiff himself. He testified that he paid to the defendant, at different times, sums amounting to \$3,601.08 for tickets in a Kentucky lottery and in “playing policy,” as it is called. He stated that the most of it was paid in playing policy; that he purchased some tickets, but was only able to specify one ticket, upon which he drew a prize of \$34. The mode of “playing policy” was described by the plaintiff as follows: “I selected certain numbers, and handed those numbers into the office then, and if those numbers came out in the drawing, why I made money; if they did not I lost. I might take four numbers, according to the style of playing — gigs and horses and saddles. * * * I merely handed the numbers in with my money, and after the official drawing was announced, I might go the same night or next morning, and if I found my numbers came out I claimed my money. I looked at the official list, and then

* See note, 28 Am. Rep. 441.

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compared the official list with my memorandum. I uniuersally played in the Kentucky lottery, having more confidence in that." A saddle represented two, a gig three, and a horse four numbers.

The court charged the jury that the plaintiff was of course entitled to recover for any ticket or part of a ticket which he purchased in the Kentucky lottery. The court also charged that "playing policy" was the purchase of an interest in a lottery, and that the plaintiff was entitled to recover for what he had paid in that manner also, and it was left to the jury to find the amount. The jury rendered a verdict for \$1,422.76.

The exception was to the latter part of the charge in reference to the policy, without specifying what particular part was intended to be excepted to. The General Term held that the exception was too general and was not strictly available. The rule requires precision in making exceptions to avoid mistakes and misrepresentations, and if several propositions are included in one exception, and either of them is correct, the exception is not available. But I think it would be too rigorous a construction to apply it in this case. That portion of the charge contained substantially but one proposition, which has been stated, and the exception is sufficiently specific to point to that proposition. The statute permits a recovery of double the sum paid, and although the recovery was less than half that sum, I do not think the evidence would warrant the recovery obtained for tickets sold without including a portion of the amount paid in "playing policy," and as the charge permitted a recovery for that, the presumption is that it was included; at all events we cannot say that it was not.

The question is therefore presented whether the "policy" transactions were within the statute. The statute is very broad and comprehensive. It will be observed that it is not confined to a sale of tickets or parts of tickets, but includes the sale of any *share or interest* in *any* illegal lottery. Section 26 of the same statute declares that "every lottery, game or device of chance in the nature of a lottery, other than such as have been authorized by law, shall be deemed unlawful." This statute evidently intended to treat every game or device of chance, in the nature of a lottery, as a lottery, and the use of that word would include all its relatives specified in the description. The word "lottery" has no technical legal meaning. It must be construed in the popular sense, and with a view of remedying the mischief intended to be prevented.

It is defined by Webster, "a scheme for the distribution of prizes by chance, or the distribution itself," and he defines "lot" as "that which causes, falls or happens; that which in human speech is called chance, fortune, hazard," and "to draw lots" is "to determine an event by drawing one thing from a number, whose marks are concealed from the drawer, and thus determining an event." Worcester defines "lottery" as "a hazard in which sums are ventured for a chance of obtaining a greater value." The language of FOLGER, J., in *Hull v. Ruggles*, 56 N. Y. 424, may be adopted as a result of the accepted definitions. "Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out by the public, what and how much he who pays the money is to have for it, that is a lottery."

Conceding that in this case the interest purchased was not an interest in the Kentucky lottery (which is not clear), that would not, it seems to me, change the substantial nature of the transaction. For a small sum the plaintiff was entitled to a much larger sum, depending upon the result of the drawing of the Kentucky lottery. Whether that sum came from the Kentucky institution, or from the defendant, or any one else, was immaterial. If the drawing in the Kentucky lottery was adopted as the wheel of fortune, although the prizes were furnished by others, the character of the transaction was not changed. It is not necessary that there should be an organized institution, or that the scheme should be called a lottery. If the defendant had set up a wheel of his own, and sold numbers which if drawn would represent prizes, he would have had a lottery, and whoever purchased numbers which were to be drawn would purchase and have an interest in that lottery. Is the circumstance that the Kentucky drawing was adopted material in determining the character of the act done? Was it not at least a game or device in the nature of a lottery? It was a practice which is within the very mischief and evil intended to be remedied. It matters not by what name it is called, or what terms are used. It has all the essential features of a lottery, and should be so construed. It has been well said that "the office of the judge is to make such construction as will suppress the mischief and advance the remedy, and to suppress all evasions for the continuance of the mischief." *Magdalen College* case, 6 Coke, 125-134.

It is said that the transaction is a wager or bet that certain numbers will draw, and is therefore not a lottery. This does not follow.

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Every lottery has the characteristics of a wager or bet, although every wager is not a lottery. A lottery, game or device in the nature of a lottery is not excluded from the operation of the statute because it also partakes of the nature of a wager.

The courts have uniformly looked beyond the mere form or device of the transaction and sought out and suppressed the substance itself. *Gov'rs of Alms-house v. American Art Union*, 7 N. Y. 228; *Hull v. Ruggles*, 56 id. 424.

It is claimed that the act of 1851 (ch. 504) is a legislative construction that "policy" is not a lottery. This act makes it a criminal offense for selling lottery policies, or any writing in the nature of "bet, wager, or insurance upon the drawing or drawn numbers of any public or private lottery." It may be that the defendant was liable under this statute, although in fact no policy or writing of any kind was issued or delivered, but I am at a loss to see upon what principle this act can be held to limit or restrict the meaning of the word "lottery" in the section under which this action was brought. The particular acts which the defendant may have done in pursuing the lottery business are perhaps described with more precision than in the section in controversy; but this cannot impair the meaning of the section as it stands. That section is general, but very comprehensive, and although the particular device adopted by the defendant may not then have been practiced, yet if its comprehensive terms embraced it, the subsequent passage of an act making such device criminal cannot affect its provisions. There is no authority for holding that a criminal remedy by one act supersedes another act giving a civil remedy. *People v. Safford*, 5 Den. 112. To adopt the construction claimed would tend to open the lottery business, with all its evil consequences, and no court would be justified in holding that such devices were not within the terms of this statute. The veil is too thin and unsubstantial.

The point that the tickets must be produced was decided in *Grover v. Morris*, 73 N. Y. 473, against the defendant.

The judgment must be affirmed.

All concur, except ALLEN, J., absent; RAPALLO, J., not voting.

Judgment affirmed.

PARKINSON v. SHERMAN.

(74 N. Y. 88.)

Deed — assumption of mortgage — estoppel — eviction.

One who takes a deed, assuming to pay a purchase-money mortgage existing on the granted premises as part of the consideration, cannot dispute the validity or consideration of the mortgage; and cannot set up failure of title until actual eviction or surrender to a paramount title.*

SUIT for foreclosure of a real mortgage. The opinion states the facts sufficiently.

Francis Byrne, for appellant. Upon the ground of fraud or mutual mistake, the contract of sale, bond, mortgage and all conveyances should be declared void and cancelled. 1 Story's Eq. Jur. (12th ed.), §§ 140, 141, 142, 143, 144; *Bingham v. Bingham*, 1 Ves. (Denio) 127; *Stapleton v. Scott*, 11 id. 425; *Hitchcock v. Giddings*, 4 Price, 135; *Fulton's Executors v. Roosevelt*, 5 Johns. Ch. 174; *Roosevelt v. Fulton*, 2 Cow. 129; *Champlin v. Laytin*, 1 Edw. Ch. 471; (affirmed, 6 Pai. 189, and in Court of Errors); *Denton v. Morris*, 2 Edw. Ch. 37; *Morse v. Elmendorf*, 11 Pai. 277; *Martin v. McCormick*, 4 Seld. 331; *Taylor v. Fleet, etc.*, 4 Barb. 95; *Burwell v. Jackson*, 5 Seld. 535; *Kingston Bank v. Elting*, 40 N. Y. 391; *Thomas v. Barton*, 48 id. 193; *In Matter of Application of Mary E. Price*, 67 id. 231; *Bennet v. Judson*, 21 id. 238.

W. T. B. Milliken, for respondent.

MILLER, J. The defendant purchased the premises described in the mortgage of one Jacobson, having agreed to assume the payment of the mortgage now sought to be foreclosed; and judgment is claimed against her for any deficiency which may arise upon the foreclosure sale. The answer of the defendant, which has been stricken out, sets up as a defense that Jacobson obtained a conveyance of the premises by means of proceedings to sell the real estate of an infant, who, it was alleged, was the owner of the premises by reason of the death of his father, sufficient proof being given to establish such death. It is alleged by said answer that the father

* See note, 28 Am. Rep. 660.

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of the infant was alive when the order of sale was made; that no conveyance of his interest was ever executed, and that the title still remains in him.

There is no doubt that the intention of the court was to authorize the sale of the premises, as the property of the infant. It was the belief of all the parties that such infant was the owner thereof, and that the purchaser acquired title by the conveyance of the special guardian to him.

The facts alleged in the answer establish beyond any question, that there was a failure of title in the infant, and that the conveyance was made under a mistake as to the death of the father. The whole proceeding for the sale of the property was founded upon the fact sworn to in the petition by the petitioner, and as a witness upon the reference, that her husband and the father of the infant was dead. The answer does not aver any eviction or disturbance of the defendant's possession of the premises, nor does it appear from the pleadings that she was in possession. The presumption, however, is from the fact that the defendant received a conveyance, that she took possession of the land, and continues to possess and enjoy the same. The question then arises whether the portion of the defendant's answer which was stricken out presents any defense to the plaintiff's action. The rights of the defendant under such a state of facts are, we think, well settled by judicial adjudications. It is held that where a grantee of mortgaged premises takes a deed of the same subject to the mortgage, and thereby assumes to pay the mortgage, he is estopped from contesting the consideration and validity of the mortgage. *Freeman v. Auld*, 44 N. Y. 50; *Thorp v. Keokuk Coal Co.*, 48 id. 253; *Ritter v. Phillips*, 53 id. 586; *Shadbolt v. Bassett*, 1 Lans. 121. The general rule is, that there must be an eviction before any relief can be granted, on the ground of a failure of title or consideration. So long as he remains in the peaceful and quiet possession of the premises, or until he surrenders possession of the same to a paramount title, the mortgagor, or the purchaser who assumes the payment of the mortgage, has no defense to the same. His only remedy is at law on the covenants in the deed. *Abbott v. Allen*, 2 Johns. Ch. 519; 7 Am. Dec. 554; *Bumpus v. Platner*, 1 id. 213; *Curtiss v. Bush*, 39 Barb. 661.

As was said in *Abbott v. Allen*, *supra*, by Chancellor KENT: "It would lead to the greatest inconvenience, and perhaps abuse,

if a purchaser in the actual enjoyment of land, and when no third person asserts, or takes any measures to assert, a hostile claim can be permitted, on suggestion of a defect or failure of title, and on the principle of *quia timet*, to stop the payment of the purchase-money, and of all proceedings at law to recover it." It does not change the principle because the person affected may be liable as mortgagee for a deficiency arising upon a sale of the premises. *Edwards v. Bodine*, 26 Wend. 109, 114. If he has no covenants, he has no remedy. *Thorp v. Keokuk Coal Co.*, 48 N. Y. 256. And even in an action on the covenant there must be an eviction or an actual ouster by a paramount lawful title. *Waldron v. McCarty*, 3 Johns. 471; *Kerr v. Shaw*, 13 id. 236; *Simers v. Saltus*, 3 Den. 214; *St. John v. Palmer*, 5 Hill, 599. The principles to which we have referred fully establish the doctrine that the answer of the defendant, which is the subject of consideration, had no relevancy to the case, and the defense set up thereby was frivolous and without point. It follows, therefore, that it was properly stricken out by the court. So much of the answer as alleged that the land was mortgaged to plaintiff, "as special guardian," is immaterial and irrelevant, and could not in any way affect the decision of the case, or the rights of the parties. Nor is it important to consider whether the deed to the defendant contained covenants for a breach of which an action would lie; for if the conveyance contained no covenants, the grantee was in fault in taking the same without any such protection, and cannot complain that no remedy exists at law. Within the rules laid down in the authorities cited, it matters not that the infant had no title so long as the defendant had not been evicted from the premises.

It is said that the appellant, having assumed payment of the mortgage debt, is to be considered as the principal debtor, as respects her covenant with her grantee, and subrogated to the rights which he had arising out of the contract of purchase. Assuming that the appellant is entitled to all these rights, it is clear that under the rules referred to it would not aid her case. She would still be in the condition of one who was in possession, and who had never been evicted, and her remedy must be enforced in a different form.

[Omitting consideration of statute.]

All concur.

Order affirmed.

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CURTIS V. DELAWARE, LACKAWANNA AND WESTERN RAILROAD CO.

(74 N. Y. 116.)

Carrier — of passengers — liability for baggage — ownership — statute of another State — paraphernalia.

Baggage, consisting of articles which had been purchased by the plaintiff and in use by the plaintiff, his wife and their child, was delivered to the defendant, a Pennsylvania corporation, at Scranton, Penn., for carriage to the city of New York. The plaintiff did not accompany it, but took another train, while the wife and child went by the train with the baggage. The baggage arrived at New York, and was there lost by negligence of the defendant. *Held*, (1) that the contract of carriage was not affected by a Pennsylvania statute limiting the carrier's liability; (2) that it was not necessary that the plaintiff should have been on the same train; (3) that in the absence of proof of a gift to the wife, the husband could recover for the wife's paraphernalia; (4) that defendant was at least liable as a warehouseman.

ACTION for loss of baggage. The opinion sufficiently shows the facts. The plaintiff had judgment.

Hamilton Odell, for appellant. The right of a passenger on a railroad to have reasonable baggage carried without additional compensation rests wholly in usage. *Hawkins v. Hoffman*, 6 Hill, 589; *Orange Co. Bk. v. Brown*, 9 Wend. 85; *Cohen v. Frost*, 2 Duer, 341; *Miss. Cent. Co. v. Kennedy*, 41 Miss. 671. The baggage must accompany the passenger in the same train. Laws of 1850, ch. 140, § 37; *Wilson v. Grand Trunk Co.*, 56 Me. 60; s. c., 2 Am. Rep. 26. It must be the baggage of the passenger. *Cahill v. L. and N. W. Co.*, 13 C. B. (N. S.) 818; *Stimson v. Conn River Co.*, 98 Mass. 83; *Becher v. G. E. Co.*, L. R., 5 Q. B. 241. Defendant is a Pennsylvania corporation, and its liability is limited and defined by the statutes of that State. *Thompson v. Ketchum*, 8 Johns. 189; *Sherrill v. Hopkins*, 1 Cow. 108; *Pomeroy v. Ainsworth*, 22 Barb. 127; *Lee v. Sillock*, 32 id. 525; affirmed, 33 N. Y. 615; *Balme v. Wanbough*, 38 Barb. 363; *Chapman v. Robertson*, 6 Pai. 627; *Everett v. Vendryes*, 19 N. Y. 437; *Dyke v. Erie Co.*, 45 id. 113; s. c., 6 Am. Rep. 43; *Waldron v. Ritchings*, 3 Daly, 288; *Levy v. Levy*, 78 Penn. St. 507; s. c., 21 Am. Rep. 35; *Adams v. Robertson*, 37 Ill. 60; *Talbot v. Merchants' Transportation Co.*, 41 Iowa, 247; s. c., 25 Am. Rep. 589; *McDaniel v. C. & N. W. Co.*, 24

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Iowa, 412; *Knowlton v. Erie Co.*, 10 Ohio St. 260; *Peninsular and Oriental Co. v. Shand*, 3 Moore's P. C. (N. S.) 272. For whatever the trunk contained which was not the personal clothing of plaintiff's wife and child defendant could only be held liable upon proof of gross negligence. *Smith v. B. & M. Railroad*, 44 N. H. 325; s. c., 21 Am. Rep. 538; *C. and C. Co. v. Marcus*, 38 Ill. 219; *Mich. South. Co. v. Oehm*, 56 id. 293; *Stimson v. Connecticut River Co.*, 98 Mass. 83; *Knowles v. A. and St. L. Co.*, 38 Me. 55; *Foster v. Essex Bank*, 17 Mass. 479; *Hawkins v. Hoffman*, 6 Hill, 589; *First Nat. Bk. v. Ocean Bk.*, 60 N. Y. 279, 293, 295; s. c., 19 Am. Rep. 181; *McCombs v. N. C. Co.*, 67 N. C. 193; *Great Northern Co. v. Shepard*, 8 Exch. 30; *Pardee v. Drew*, 25 Wend. 459. Defendant was not liable as a warehouseman. *Morrill v. N. E. Co.*, 1 Q. B. Div. 302; *Harris v. G. W. Co.*, id. 515; *Lamb v. West. R. R. Co.*, 7 Ala. 98; *Putnam v. Hubbell*, 42 N. Y. 106; *Mason v. Lord*, 45 id. 477; *Matthews v. Coe*, 49 id. 57.

Edward Mckinley, for respondent.

MILLER, J. The right of a passenger to recover of a railroad corporation damages arising by reason of a loss of baggage while travelling upon the railroad is fully established, and according to the laws of this State there can be no question as to the liability of such company for the loss actually sustained, when it fails to fulfill the contract with the traveller, or is chargeable with negligence, by which the damages are caused. The baggage, for which a recovery was had, was delivered to the defendant at Scranton, in the State of Pennsylvania, to be transported to and delivered in the city of New York. The first question which arises upon this appeal is, whether the statute of the State of Pennsylvania, passed in 1867, which limits and defines the liability of railroad corporations upon contracts entered into by them for the transmission of baggage, forms a part of the contract between the plaintiff and the defendant, and should be considered as determining the right to recover and the amount of the recovery. I think that the statute cited has no application, and that the rights of the parties must be determined in accordance with the laws of the State of New York, which are applicable to such contracts, as is manifest by referring to the principles which govern contracts of this description. One of the rules applicable to the subject is that the *lex loci contractus* is to govern, unless it appears upon the face of

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the contract that it was to be performed in some other place, or made with reference to the laws of some other place, and then the rule of interpretation is governed by the law of the place. *Dyke v. Erie Railway Co.*, 45 N. Y. 113 ; s. c., 6 Am. Rep. 43 ; *Sherrill v. Hopkins*, 1 Cow. 103. The place of delivery was a material and important part of the contract, and until such delivery, the same was not completed and fulfilled. Upon a failure to deliver the baggage to the plaintiff, in the city of New York, there was a breach of the contract; and as the final place of performance was in that city, it would seem to follow, that within the rule laid down, the contract was to be governed, at least so far as a delivery is concerned, by the laws of New York. This certainly was to be in a different place from where the contract was made, and it is a reasonable inference that it was in the contemplation of the parties at the time, and that it was entered into with reference to the laws of the place where it was to be delivered. So also, when it appears that the place of performance was different from the place of making the contract, it is to be construed according to the laws of the place where it is to be performed. *Sherrill v. Hopkins*, *supra*, p. 108, and authorities there cited ; *Thompson v. Ketcham*, 8 Johns. 189 ; 5 Am. Dec. 332 ; 4 Kent's Com. 459. The place of final performance of the contract being in the city of New York, although the transportation was mostly through other States, no reason exists why a failure to deliver the baggage should not be controlled by the laws which prevail at the place of delivery. It is said that the contract is entire and indivisible, and we are referred to some cases outside of this State, which, it is claimed, sustain the doctrine that the locality where the contract was made, in cases of this character, must control. None of the cases cited are entirely similar to the one at bar and they do not involve the precise point now considered. But even were it otherwise, they are not, I think, controlling, as no reason exists why a contract to deliver baggage should not be governed by the laws of the place where the baggage is to be delivered.

It is also said that the plaintiff has no right of action whatever; that he was not a passenger by the train, having previously passed over the road, and he had no right to have his property brought by another train at a later day. The baggage in question consisted of articles which had been in use by the plaintiff and his wife and child, and the wife and child were on the same train, accompanying the baggage. It may be assumed, I think, that the plaintiff was

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sufficiently represented by his wife, and it was not absolutely necessary that he should be personally present, either under the statute of Pennsylvania or otherwise, to entitle him to maintain an action for the loss of the baggage. The relationship existing between husband and wife is of such an intimate and confidential character that she may properly be regarded as representing him, under the circumstances presented. She was certainly acting in the place and on the behalf of her husband, in travelling over the defendant's road, and it would be establishing a rigid and a severe rule, which is not sustained by authority, to hold that where the husband, by reason of business or otherwise, was obliged to leave the baggage for himself and family in charge of his wife, to be brought at a future day, that all claim for damages for any cause was lost. In none of the cases cited to maintain the position, that no recovery can be had where the owner is not with the baggage, does it appear that the wife of the plaintiff had the baggage in charge, or that in part it was for the use of the owner and his wife and child. The baggage being, to some extent, at least, for the benefit of the members of the plaintiff's family, who were on the train, and had paid their fare, the case is distinguishable from one where the plaintiff's servant, or some other person, who has no interest in the baggage, takes his place, or even where the plaintiff himself follows the baggage on a later train. See *Wilson v. Grand Trunk Co.*, 56 Me. 60; s. c., 2 Am. Rep. 26; *Becher v. Great Eastern Co.*, L. R., 5 Q. B. 241; *Stimson v. Conn. River Co.*, 98 Mass. 83; *Belfast and Ballymena Co. v. Keys*, 9 H. of L. Cases, 556.

The right of the husband to maintain the action as against a stranger is quite clear. The judge, on the trial, found that he was the owner, and the evidence shows that he had purchased most of the articles, as necessaries for the proper clothing of himself, his wife and child. He clearly had a right to sue for his own wearing apparel and for that of the infant. He had never absolutely parted with any portion of it to his wife, and hence she had no direct title to the same, or control over it, upon any such ground.

The contest here is not between husband and wife in regard to her paraphernalia, but for damages for the loss of articles which the husband had a right to control and dispose of. At common law, during coverture, the wife's paraphernalia belonged to the husband, and for an injury to it he was the proper party to sue. The statute has not changed the rule, except that the wife's para-

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phernalia is secured to her even against creditors. 2 R. S. 84, §§ 9, 10. The title is in the husband when he has paid for the articles, and furnished them. Nor do the statutes in reference to the rights of married women, and gifts of personal property from the husband to the wife, affect the husband's right, until a gift has been actually made, and is proved. As the evidence does not show any such gift, the right of the husband was paramount and should be upheld. Where there is a gift, the wife may bring an action, but otherwise the husband must sue. *Rawson v. Penn. R. R. Co.*, 2 Abb. (N. S.) 220; s. c., on appeal, 48 N. Y. 212; s. c., 8 Am. Rep. 543; *Rodgers v. Long Island R. R. Co.*, 1 N. Y. Sup. (T. & C.) 396.

It is also insisted that as the statute only permitted Mrs. Curtis, as a passenger, to carry with her, at the defendant's risk, a limited amount of "her personal clothing," and possibly her child's "personal clothing," as baggage, the law will regard the remainder as merchandise. And as to that the defendant was not a common-carrier, but a gratuitous bailee, and liable only for gross negligence. The answer to this position is, that if the plaintiff, as husband, was entitled to the control of the property, and it may be regarded as belonging to him, it cannot be said that the restriction contained in the statute, even if it was in force as to the contract in question, could affect the plaintiff's claim.

Nor is there any ground for claiming that the plaintiff was bound to prove gross negligence, within the principle decided in *Magnin v. Dinmore*, 62 N. Y. 35; s. c., 20 Am. Rep. 542. In that case there was evidence to show a suppression of the truth, and that a fraud was practiced which affected the decision, and the forwarding of packages by express was the especial business of the company, while with a railroad corporation the transmission of baggage is only incidental to the carrying of passengers.

The reasons already stated are entirely sufficient to uphold the judgment of the trial court; but there is another ground upon which, I think, it may be sustained. The judge found that the baggage, consisting of the personal clothing of the plaintiff's wife and infant son, was safely brought by the defendant from Pennsylvania to the city of New York, and was there lost by the negligence of the defendant. The evidence also shows that the plaintiff demanded the baggage immediately upon the arrival of his family in New York, and at two different times after this, and on neither of these occasions was it produced, nor was any explanation given

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of the cause of its disappearance. Proof was also given that a few days after the last demand a person claiming to act for the defendant saw the plaintiff, stated that he called at the request of the company ; that the company's office had been broken open in New York and the baggage stolen, and offered to pay the plaintiff \$100 for the same, which offer was refused. The evidence last mentioned does not establish the liability of the defendant, and would have been excluded, as hearsay testimony, if objected to. As however, the baggage was not delivered when demanded, and no satisfactory explanation given for its non-delivery, without regard to the question whether the defendant became liable as a common carrier, I think it incurred the responsibility of a warehouseman, or that of an analogous character, and was liable for negligence. *Fairfax v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 11; Story on Cont., §§ 446, 447, 448 ; 2 Par. on Cont. 140 ; Angell on Carriers, 267 ; *Hathorn v. Ely*, 28 N. Y. 78 ; *Burnell v. N. Y. C. R. R. Co.*, 45 id. 184, 186 ; s. c., 6 Am. Rep. 61. If it had arrived, as was found, it certainly could not have been disposed of without some act of the defendant's agent, or neglect of its duty as a warehouseman or bailee. If it was detained without any cause, then clearly the defendant was liable for refusing to deliver the same when demanded.

Some of the articles contained in the trunk, amounting in value to the sum of \$144, did not consist of personal clothing which might be considered as useful and necessary for the plaintiff and his family, while temporarily absent from home. What should constitute necessary baggage for a traveller depends very much upon the circumstances of each particular case. The conveniences required for the journey which has been taken, the duration of the absence, as well as the position of the parties, have considerable to do with it, and all these are to be considered as a question of fact for the decision of the court or the jury. No particular point was made, upon the trial, in regard to these articles, nor any special request that they should be deducted from the value of the whole, and it is but reasonable to assume that the question was not raised. We are not, therefore, called to decide whether there was error in this respect.

We are unable to discover any ground for reversing the judgment, and we are of the opinion that it should be affirmed.

All concur.

FOLGER and EARL, JJ., concur on first ground.

Judgment affirmed.

Baldwin v. Liverpool and Great Western Steamship Co.

BALDWIN V. LIVERPOOL AND GREAT WESTERN STEAMSHIP CO.

(74 N. Y. 135.)

Carrier — contract for price of carriage — detention of goods for increased price.

A common carrier received a package for transportation, agreeing to carry it for a stipulated sum prepaid, without inquiry into its value, or notice of a limited liability on account of value, and without misrepresentation, deceit or artifice on the part of the shipper. Discovering that the package was of greater value than he had supposed, he refused to deliver it to the consignee without additional compensation, which the consignee paid. *Held*, that the latter might maintain an action to recover it back.

ACTION to recover money paid under duress of goods.

The plaintiffs delivered to the defendants, carriers between New York and Liverpool, at New York, for transportation to Liverpool, two boxes, addressed to Bischoffsheim & Goldschmidt, London, defendant delivering a parcel receipt and receiving his charges for freight of the boxes. There was nothing in the appearance to indicate that the contents were of any considerable value. On the arrival of the steamship at Liverpool, defendants refused to deliver one of the boxes, unless £200 sterling additional should be paid for the transportation, which the consignees paid under protest. The boxes contained railroad bonds of about the par value of \$1,000,000, purporting to be negotiable by delivery. The plaintiffs as express carriers had agreed with the said railroad company to forward and transport the boxes to London, and there deliver the same to Bischoffsheim & Goldschmidt, bankers, as the agents of the railroad company. By the rules of the London Stock Exchange, and the general custom of London, it is necessary that all negotiable securities offered for sale at the London stock market shall be countersigned by some reputable firm of London stock brokers, as a certificate of genuineness. It was intended that said bonds should be so countersigned by Bischoffsheim & Goldschmidt before their negotiation on the London market. The plaintiffs did not use any deceit toward the defendant, nor misrepresent the character or value of the contents of the boxes, nor was the form or appearance of the boxes such as to mislead the defendant. The defendant made no inquiry of the plaintiffs as to the value or character or

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the contents of the boxes. The plaintiffs prepaid to the defendant at New York six dollars, the agreed sum for the transportation. £200 would have been a reasonable compensation for the carriage and risk of transportation of negotiable bonds that would pass by delivery, of the value of \$1,000,000. In the usual course of business, the amount of such compensation would be determined, not by any fixed tariff or rule, but by negotiation and agreement between the parties; but in case of property of that value and character, the sum above named would be a reasonable and customary charge therefor. The plaintiffs had judgment.

George C. Holt, for appellant. The circumstances under which the goods were shipped amounted to a fraud upon defendant, and authorized it to demand additional compensation. *Magnin v. Dinsmore*, 62 N. Y. 45; s. c., 20 Am. Rep. 442; *Gibbon v. Paynton*, 4 Burr. 2298; *Pardee v. Drew*, 25 Wend. 461; *Miles v. Cattle*, 6 Bing. 743; *Bradley v. Waterhouse*, Moody & M. 154; *Chicago, etc., Co. v. Thompson*, 19 Ill. 578; *American Co. v. Perkins*, 42 id. 458; *Orange Co. Bank v. Brown*, 9 Wend. 116; 2 Kent, 603. Aside from the fraud, defendant had a right to demand the amount collected at Liverpool as compensation for the risk incurred. *Riley v. Horne*, 5 Bing. 217; *Magnin v. Dinsmore*, 62 N. Y. 39; s. c., 20 Am. Rep. 442; *Walker v. Jackson*, 10 M. & W. 169. Angell on Carriers, § 150; *Coggs v. Bernard*, Smith's L. C. 291.

S. Jones and William M. Hoes, for respondents.

CHURCH, C. J. It is not disputed but that if the defendant was not legally entitled to exact the £200, for the transportation of the boxes, the plaintiffs are entitled to recover it back as having been paid under duress of goods.

The defendant might, and probably ought to have charged and been paid more than six dollars for carrying the two boxes to Liverpool, but it is difficult to find any principle of law under the findings of fact in the case to sustain the defendant's claim for a greater compensation than that agreed upon. The referee found that "the plaintiffs did not use any deceit toward the defendant, nor was the form or appearance of the boxes such as to mislead the defendant, nor did the plaintiffs in any way misrepresent to the defendant the character, or value of the boxes, or of their contents." Whether the evidence would have warranted a different finding

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upon some of these points, it is not necessary to inquire. It is sufficient that the evidence warranted the findings as made, and even if this court would have drawn other inferences from the facts proved, we cannot interfere with the conclusions of the referee, and these having been affirmed by the General Term, they are conclusive upon us. The case therefore presents these parties as dealing at arm's length. The plaintiffs offer two boxes for transportation to Liverpool, and the defendant agrees to carry them for six dollars, which is assented to, and paid by the plaintiffs. There was no deceit or artifice resorted to by the plaintiffs, nor was the form or appearance of the packages such as to mislead the defendant, nor was there any misrepresentation on the part of the plaintiff. There was no notice of a limited liability based upon value from which an implied representation of value might arise, and no inquiry was made by the defendant upon that subject.

As the case stands before us, I am unable to see any reason why the defendant should not be bound by its contract. It was competent to contract, and if it made a poor bargain, the fault was its own in omitting to attend to its own interests. In the sale and purchase of property, if there is neither fraud nor warranty, the maxim *caveat emptor* applies, and there is no liability. The same principle applies here. Common carriers more than other persons cannot shut their eyes when dealing with others, and then ask the court to make new contracts for them. It requires two parties to make a contract. Here the defendant seeks upon its own motion to set aside its contract, and substitute another without the consent of the other party, and that too after performance by both parties, on the sole ground that the original contract was not as beneficial as it ought to have been. The case as found exemplifies the correctness of the general rule that in the absence of fraud, a person ought to be held bound by his contracts. The value of the contents of the boxes was in dispute, both at the trial and General Term, and is now in dispute. The railroad company and the plaintiffs regarded the bonds as incomplete, and not negotiable, and of the value only of the cost of reproduction, while the defendant insists that they were completely executed, and if in the hands of a *bona fide* purchaser would be a valid debt for their face against the railroad company, and hence that they were entitled to compensation for the carriage, including the risk, as if they were valid, negotiable securities.

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Suppose the defendant had known the contents at the time and demanded £200 for its compensation, *non constat*, but the plaintiffs might have declined, and sought conveyance in some other mode. They would have been at liberty to do so, or to have compromised on some lesser sum. The defendant seeks to make them liable upon a contract, which they not only never did make, but for aught that appears never would have made, and without fault on their part.

We have been referred to no authority, and I have been unable to find any which sustains the contention of the defendant. It is well settled that when the carrier has not given notice that he would not be answerable for parcels, beyond a specified sum, unless informed of the value, or has made a special acceptance, it is not the duty of the shipper to state the quality or value. In the language of HOLROYD, J., in *Batson v. Donovan*, 4 B. & Ald. 29, a case very fully considered and since repeatedly approved, "for then it would have been his (the carrier's) duty to make inquiry if he either wished to have a reward proportionate to their value, or to know whether they were goods of that quality for which he had sufficiently secured conveyance." This rule does not apply if the shipper has used any means to conceal the value of the article, or is guilty of any misrepresentation or fraud in respect to it. *Orange Co. Bank v. Brown*, 9 Wend. 85. In this case the carrier was held not liable for a large sum of money in the trunk of a passenger. The delivery of the trunk was regarded as a representation that it contained only what might be lawfully regarded as baggage which would not include money beyond, at all events, what was necessary for travelling expenses. But NELSON, J., in delivering the opinion, states the general rule when there is neither notice nor special acceptance, to be, that "the carrier is bound to make inquiry as to the value of the box or article received, and the owner must answer truly, at his peril, and if such inquiries are not made, and it is received at such price for transportation as is asked with reference to its bulk, weight, or external appearance, the carrier is responsible for its loss, whatever may be its value." *Walker v. Jackson*, 10 M. & W. 168. The recent case in this court of *Maguin v. Dinmore*, 62 N. Y. 35 ; s. c., 20 Am. Rep. 442, expressions from the opinion in which are cited by each of the parties in this case, recognizes these rules. The point decided was that when the carrier by the contract limits his liability to a specified amount, if the value

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is not stated by the shipper, the delivery of the article without any thing being said, is a sufficient representation that the article is not in value beyond the limit to constitute a fraud in law, which will discharge the carrier from liability at least for ordinary negligence, and this is upon the ground that the carrier is thereby deprived of his proper reward, and is misled as to the degree of care and security which he should provide. It is analogous in principle to the last case cited. They establish that acts may constitute misrepresentation as well as words, and though silent, the passenger in the first case, by delivering an ordinary trunk when taking passage for himself, gave the carrier to understand that it contained ordinary baggage only, and in the last case the shipper, having notice of a limited liability if the value was not specified by delivering the article without specifying the value, in effect represented that its value did not exceed the limit. This is as far as any of the cases have gone in favor of the carrier, and in my judgment the doctrine resulting in immunity from liability should not be extended. Story on Bailments, § 567, and cases cited.

It is contended that this presents a case of fraud in law. I think not. There having been no notice, nor special acceptance, an implied representation of value cannot arise, as in the case of *Magnin v. Dinsmore, supra*, and whether the size or appearance of the boxes was calculated to mislead, and whether the two boxes were a portion of the five boxes referred to in the evidence, upon the stub of the receipt given for which the word "samples" was written, and if so whether that word was contained in the receipts to the knowledge of the shipper, were questions of fact bearing upon the general question whether the shipper used any means to mislead or deceive the carrier. This general question has been found against the defendant in every phase of it, and we cannot review it. It does not fall within the principle of any case where any court has held the shipper liable for fraud in law. All that can be said is that the carrier supposed that the boxes contained articles of small value, but omitted to exercise any care or diligence to ascertain their true value, while the shipper neither did nor said any thing expressly or impliedly which did mislead, or was calculated to mislead or deceive him.

It is also contended that aside from the question of fraud, the defendant had a right to demand the amount collected at Liverpool as compensation for the risk incurred. The argument in favor

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of this proposition is that the rule of liability of common carriers is based upon considerations of public policy, and not upon the contract, and that while the law compels him safely to carry, however small the sum paid, such does not cover a compensation for a risk incurred, of the extent of which he was not apprised. No authority is cited for this position, and it seems to me plainly untenable. True, the rule of liability is founded upon considerations of public policy, but this element does not distinguish a contract of carriage from other contracts. Such a contract necessarily includes all risks, and the compensation agreed upon is regarded as sufficient for all liabilities. A carrier is not bound to take goods without a just compensation, and may exact prepayment, but the law regards him as competent to make contracts, and if he agrees to carry for an inadequate compensation he is bound by his contract as well in respect to his compensation, as in respect to any other element of the contract, and he cannot plead ignorance unless the shipper is in some way in fault within the rules before adverted to.

I agree with the learned counsel for the appellant that the plaintiffs could not interpose their own fraud as an answer to a claim for proper compensation upon the ground that such fraud would relieve the defendant from liability, for the reason that the fraud would vitiate the contract, and would probably entitle the defendant to go upon a *quantum meruit*. Whether the fraud would affect the question of the amount of compensation it is unnecessary to decide. The plaintiffs claim that there was no fraud, and this claim has been adjudged in their favor. In the view taken of this case by the referee, and at General Term, and by this court as above indicated, the question of the extent of the liability of the defendant in case the bonds had been lost or stolen is immaterial. The defendant was bound by its contract both as to compensation and obligation to safely carry, and it is useless to speculate upon the possible consequences to the defendant of entering into it. The other points are not deemed important or tenable.

The judgment must be affirmed.

All concur.

Judgment affirmed.

Dunlop v. Patterson Fire Insurance Company.

DUNLOP V. PATTERSON FIRE INSURANCE COMPANY.

(74 N. Y. 145.)

Attachment — money in custody of court.

Money deposited with the clerk of a court, in pursuance of law, in place of an undertaking on appeal, is liable to attachment by a third person against the depositor.*

MOTION to set aside levy by attachments. The attachments were levied upon \$2,000 placed in the hands of the clerk of the city court of Brooklyn in lieu of an undertaking on appeal from a judgment in an action in favor of one Redfield against defendant.

Preston Stevenson, for appellant. The fund upon which the sheriff levied is not attachable. It is in *custodia legis*. *Taylor v. Carryl*, 20 How. 583, 594; *Freeman v. Howe*, 24 id. 450; *Muscot v. Woolworth*, 14 id. 477; *Baker v. Kenworthy*, 41 N. Y. 215; 2 Wait's Practice, 161; Drake on Attachment (4th ed.), §§ 251, note 3, 402, 503, 508; *Shenn v. Zimmerman*, 3 Zab. 153, 154; *Leightner v. Steinagh*, 35 Ill. 510; *Hill v. Lacrosse and Nill. R. R.*, 14 Wis. 291; 3 Ill. 451; 3 Cal. 363; 9 Mo. 382; 3 Mass. 289; 17 Pick. 462; 1 Hain. 135; Wait's Practice, *supra*; Crary's Special Proc. (5th ed.), 112; *Alstore v. Clay*, 2 Haywood, 171; *Hunt v. Stevens*, 3 Ired. 365; 7 Gill & Johns. 428; 7 Humph. 132; 3 Hill (S. C.), 12; Bailey's Cas. in Eq. 364–367; 1 Murph. 48; Sargeant on Attachment, 89; Locke on Attachment, 33, 44; 8 Mass. 246; 1 Dallas, 354; 4 T. R. 312; 12 Ill. 358; 33 id. 510; 7 Humph. 132; *Crane v. Freer*, 1 Harr. 305; *Hurlburt v. Hicks*, 17 Vt. 193; *Lovejoy v. Lee*, 35 id. 430. Defendant had no attachable interest in the fund. Drake on Attachments, §§ 551, 552; *Bates v. N. O. J. & N. G. R. R.*, 13 How. 516; *Jones v. Bradner*, 10 Barb. 193; *Buckmaster v. Smith*, 22 Vt. 203; 2 Wait's Practice, 162; *Faulkner v. Waters*, 11 Pick. 473.

Condert Brothers, for respondent.

FOLGER, J. [Omitting a minor point.] Doubtless the property, which was, in fact, made the subject of attachment, was in the

* See contra, *Hardy v. Tilton* (68 Me. 196), 28 Am. Rep. 84, and note 35.

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not yet paid over to him, though he has the right to have payment of it, is not his goods, and so there can be no caption of it as such. But when the process is also against a right to have property, and may be executed against an intangible right, by giving notice of the existence of the process, or by garnishment as it is called, the reason of the rule from the cases just cited does not remain. It is not denied, I think, in that class of cases, that if there exists such relation between the officer and the defendant in the attachment suit, as that there is a credit, or the right of the latter may be deemed effects of his, there may be a garnishment (*Wilder v. Bailey*, 3 Mass. 289, 292); or if the money have been intrusted or deposited with the officer by the attachment defendant. *Id.* Clearly, in the case before us, the defendant did deposit and intrust with the clerk its own money, which remained its own money when the attachment order was served upon the clerk; and that money always has been the goods, credits and effects of the defendant, deposited in the hands of the clerk, and of which he is a trustee of the defendant. *Id.* 294.

There is another class of cases. They hold that a debt that has passed into judgment against the debtor may not be attached in his hands. *Shinn v. Zimmerman*, 3 Zab. 150. It is for the reason that the debtor is then liable to the execution on the judgment, and has no chance to plead the levy of the attachment; and if the latter be held good against him, he would be placed between clashing peremptory processes of different courts. It is not necessary to inquire whether this rule is applicable to our process of attachment, for it is not involved in the facts of this case.

There is another class of cases which comes nearer to that in hand. It is held by them, in general terms, that money in the hands of a public officer is not the subject of attachment. In some of them the decision is put upon the phrases of the statute allowing the process. *Chealy v. Brewer*, 7 Mass. 259, where the words of the statute required an intrusting and deposit by the debtor with the officer, which words are not in our Code; and if they were are met by the facts of our case. Or the money was part of a mass of public money, held by the officer for public purposes, the right to which in the attachment debtor did not have the character of a private claim against the officer. *Bulkley v. Eckert*, 3 Penn. St. 368. It is not to be denied, however, that a broader rule has been laid down; that no person deriving his authority from the law, and obliged to

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execute it according to the rules of law, can be charged as garnishee in respect of any money or property held by him, in virtue of that authority. See Drake on Attachments, §§ 494 *et seq.*, and cases cited. I have examined enough of those cases to perceive the rules laid down by them. In all which I have read, however, there is this to be noticed: That the money in the hands of the officer of the law did not go there directly from the debtor in the attachment, but from some other and original and independent source, over which the attachment debtor had no control as an owner. *Coppell v. Smith*, 4 T. R. 313. In this there is a material distinction from our case. Here the money was the absolute property of the attachment debtor, and always continued to be its property, subject to the express and limited right of the clerk over it, conferred principally by the act of the attachment debtor. As when the right of the clerk to withhold the whole or a part of it ceased, that debtor could demand and have the whole or a part of it, why, as above suggested, might not the debtor have its right of proceeding as against the clerk; and if so, why not be able to transfer that right; and if so, why may not the law transfer it? Even in some of the cases above referred to, there is a distinction taken which makes for our view — as if money is collected by a sheriff in excess of the needs of the execution, that excess is attachable. *Pierce v. Carlton*, 12 Ill. 358; *Lightner v. Steinagel*, 33 id. 510. And the reason given is that such excess is so much money in the hands of the officer, had and received for the use of the debtor in the execution. The same reason applies here to any portion of the deposit with the clerk in excess of the amount needed to satisfy the claim of Redfield. It is further said, that if any thing arises to change the relation of the officers from an official obligation to personal liability, he will be amenable to the process of garnishment. It will be seen further on herein, that this change was effected in the case in hand. And it is to be seen, on examination, that many of the reasons given against the power to attach moneys, or the right to moneys in the hands of an officer, do not apply to the case before us. In addition to those already given is this: That it would lead to litigation in one suit over the effects in another, and would produce embarrassment and confusion to permit one process to intercept money raised on another, while in the hands of the officer; and that it might often lead to injustice, inasmuch as often the names of persons who have the real right to money raised by pro-

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cess. do not appear upon the process by which the money was got. *Ross v. Clarke*, 1 Dallas, 354 ; *Crane v. Freese*, 1 Harris. 305. Yet, notwithstanding this, in the case last cited it was held, that the attachment was well levied on the rights and credits of the attachment debtor in the hands of the sheriff, and a feasible way was pointed out of avoiding the difficulties spoken of, viz.: For the officer to bring the money into court, which can control the application of the funds. In the case in hand, the money is already in court, susceptible of the treatment indicated.

It is urged that the interest of the defendant in the money on deposit is but contingent; and then it is claimed that an attachment may not be levied upon a contingent interest. There are decisions to the effect claimed by the appellant. *Bates v. N. O., J. & G. N. R. R. Co.*, 13 How. 516; *Jones v. Bradner*, 10 Barb. 193; *Faulkner v. Waters*, 11 Pick. 473. It is not necessary that we now examine these cases and determine whether we coincide with the conclusions of them. In the case in hand the right of the attachment debtor in the deposit was not contingent. The original legal title to it was in the debtor, and the ultimate title still remained in it, subject to the liability of the money to answer the claim upon it of Redfield. That claim, by stipulation of the parties to the action in the city court, confirmed by the order of that court, had been adjudged and liquidated at a sum certain, and there was left a considerable balance to be returned to the attachment debtor which that order directed the clerk to pay over to the attorney of the defendant in that action, or to his order. Thus there was a right in the money on deposit fixed and certain.

[Omitting minor points.]

We find no reason for a reversal of the orders appealed from. They should be affirmed.

All concur, except CHURCH, C. J., not voting.

Orders affirmed.

Stuart v. Palmer.

STUART V. PALMER.

(74 N. Y. 188.)

Constitutional law — assessment for local improvement — notice — hearing.

A law imposing an assessment for a local improvement, without providing for notice to the owners of property to be assessed, and an opportunity for them to be heard, is unconstitutional and void, and an assessment thereunder creates no cloud upon title.

ACTION to vacate an assessment and remove cloud from title. The opinion states the facts. The defendant had judgment.

James R. Adams, for appellant. A court of equity has jurisdiction to grant the relief asked for. *Marsh v. City of Brooklyn*, 59 N. Y. 280; 4 T. & C. 413; *Scott v. Onderdonk*, 14 N. Y. 9; *Hatch v. City of Buffalo*, 38 id. 276; *Shaw v. Dwight*, 27 id. 245; *Crooke v. Andrews*, 40 id. 551; *Newell v. Wheeler*, 48 id. 486; 1 R. S. (5th ed.) 934, § 99, 935, § 101, 936, § 109.

EARL, J. In 1869 an act was passed by the legislature entitled "an Act to lay out, open and grade Atlantic avenue in the town of New Lots, Kings county." It provided that the Supreme Court should appoint three freeholders of that town commissioners for the purposes of the act; that they should proceed to lay out the avenue as directed in the act; that if the owners did not convey the requisite land to the town they should take the same and estimate the value thereof, and award damages for taking the same; and that they should assess the amount of the award upon the lands benefited by the opening of the avenue in proportion to benefits. The act made ample provision for notice to and hearing of all the persons interested before the making and final confirmation by the Supreme Court of the award and assessment. Section 4 of the act, as amended by chapter 619 of the Laws of 1870, provided that upon the confirmation of the report in relation to the opening of the avenue, or on the conveyance of the land taken for the avenue to the town, the commissioners should be authorized to enter upon the lands and cause the same to be regulated, graded and otherwise improved, and to assess the expense of such regulating, grading, etc., upon the lands which in their judgment

should be benefited by such improvement in proportion to the benefits; and that they should certify such assessment, with the names of the parties assessed, to the supervisor of the town, and that the amounts so assessed should, together with interest from the time of making the assessment until the expiration of the warrant of the collector, be added by the supervisors of Kings county to and be made a part of the annual taxes for the ensuing year upon the lands upon which they should be assessed, and should be a lien thereupon, and levied and collected in the same manner as other taxes are required by law to be collected.

It will be observed that two assessments are provided for by the acts; one for the damages awarded to the owners of the land, under section 3 of the act of 1869, as amended, and another for the expense of regulating, grading, etc., under section 4, as amended. The former assessment was to be made and confirmed after proper notice to and hearing of the persons interested. The latter assessment could be made without any notice to or hearing of any person. The law requires no notice, and a provision for notice cannot be implied. Upon the assumption that the law was valid, there was ample authority for the commissioners to make the assessment without any notice or hearing; and the assessment, when once made in the exercise of the arbitrary discretion thus conferred, would be unassailable, and however unjust, unfair and oppressive, would be subject to no review, unless fraud or corruption could be shown.

Under these acts commissioners were appointed, and they proceeded to open and improve the avenue at a large expense; and in 1871, in pursuance of section 4, they made an assessment for such expense upon the lands, which, in their judgment, were benefited by the improvement, and certified the assessment to the supervisor of the town, and the supervisors of the county added the amount thereof to the annual taxes of the town and issued a warrant for the collection thereof to the collector of the town. The amount assessed against land of the plaintiff was upward of \$1,100, and that sum by the terms of the act became a lien upon his land. The plaintiff then brought this action to remove such lien as a cloud upon the title to his land.

Upon the trial the plaintiff claimed that the assessment was illegal and void, upon two grounds: (1) That it was for more than the expense of the improvement, and (2) that it was made without

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any notice to or hearing of him or other property owners. He offered to give evidence of the first ground which, upon the objection of the defendants, was excluded by the court; and this exclusion was urged upon the argument before us as one ground of error. It was fully admitted upon the trial that there had been no notice or hearing as to the assessment; and it was claimed by the defendants that the property owners were entitled to no notice or hearing under the law.

The court at Special Term, found, as matter of fact, that no notice of any kind concerning the assessment was ever made, issued, published or given to the plaintiff or other property-holders affected by the assessment, and that the plaintiff was never afforded an opportunity by notice to object to or complain of the assessment, or to have it reviewed, or to apply for a review thereof, or to examine the same; and it decided, as a conclusion of law, that the plaintiff and other property-owners were not, under the law, entitled to notice of the assessment or an opportunity to be heard in reference thereto, and that the assessment was therefore regular and legal. The General Term took the same view of the law and affirmed the judgment of the Special Term.

We shall examine and consider but one question, which we deem decisive of this case, and that is whether the act authorizing the assessment was constitutional. If it was unconstitutional, no valid assessment could be made under it; and the invalidity of the assessment would always appear, and it could constitute no such cloud upon title as to call for the interference of a court of equity. *Newell v. Wheeler*, 48 N. Y. 486; *Marsh v. City of Brooklyn*, 59 id. 280.

Here was an expense for a local improvement of more than \$100,000. The commissioners were to ascertain what land within the district of assessment was benefited, and then to apportion and assess the said sum upon such land in proportion to benefits. The assessment when made was declared to be a lien upon the land, and its payment could be enforced by a sale thereof.

I am of opinion that the Constitution sanctions no law imposing such an assessment, without a notice to, and a hearing or an opportunity of a hearing by the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and

an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority, be done. The legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice.

It is not disputed that the legislature has unlimited power (except as restrained by the Federal Constitution) to impose taxes and assessments for public purposes. It may impose taxes upon all property within the State; and in such cases, the owners are supposed to receive a compensation for the burdens thus imposed in the protection and benefits of the government under which they live. It may impose taxes upon local divisions of the State for the purposes of local government, and all the citizens residing in the locality must bear the burdens, as they all receive the benefits of the local government. It may cause or authorize local improvements to be made and authorize the expense thereof to be assessed upon the land benefited thereby. But in all cases there must be apportionment of the burdens, either among all the property owners of the State, or of the local division of the State, or the property owners specially benefited by the improvements. In either case, if one is required to pay more than his share, he receives no corresponding benefit for the excess, and that may properly be styled extortion or confiscation. A tax or assessment upon property arbitrarily imposed, without reference to some system of just apportionment, could not be upheld.

Assessments for local improvements can be justified only upon the theory that the lands upon which they are laid are specially benefited by the improvements for which they are laid and hence ought to bear the burden rather than property generally; and if a law should authorize such assessments to be laid, without reference to benefits, it would either take property for the public good, without compensation, or it would take the property from one person for the direct benefit of another; and in either aspect it would be unconstitutional. *Kirby v. Shaw*, 19 Penn. St. 258; *Schenley v. Commonwealth*, 36 id. 29; *McGonigle v. Allegheny City*, 44 id. 118; *In the Matter of Washington avenue*, 69 id. 360; *Patterson v. Society, etc.*, 24 N. J. 385; *Tide-water Co. v. Costar*, 18 N. J. Eq. 519; *In the Matter of the Drainage of Lands*, 35 N. J. 497;

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St. John v. East St. Louis, 50 Ill. 92 ; *Lee v. Ruggles*, 62 id. 427 ; *In the Matter of Albany street*, 11 Wend. 149 ; *Litchfield v. Vernon*, 41 N. Y. 123.

What one pays for taxes and assessments is taken for the public good and can be justified upon no other theory. Private property cannot be taken for private purposes, even under the legislative power of taxation. *Weisner v. Village of Douglass*, 64 N. Y. 91 ; s. c., 21 Am. Rep. 586. Taxation and assessment imply apportionment. Each person must share the burdens of taxation and assessment equally with all others in like situation. Property may also be taken by the right of eminent domain where the public good requires. In such case what one parts with is just so much more than his share of contribution to the public good, and hence for such property he must receive compensation in money or its equivalent. *People v. Mayor of Brooklyn*, 4 N. Y. 419 ; *Baltimore v. Harris*, 26 Md. 194.

It must be conceded that property cannot be taken by the right of eminent domain, without some notice to the owner, or some opportunity on the part of the owner, at some stage of the proceeding, to be heard, as to the compensation to be awarded him. An act of the legislature, arbitrarily taking property for the public good, and fixing the compensation to be paid, could not be upheld. There would in such case be the absence of that "due process of law" which both the Federal and State Constitutions guarantee to every citizen. Can it be, that when the public takes land for a public highway, the owners thereof are entitled to a hearing as to the compensation which they are to receive, and yet that the lands on both sides of the highway may be assessed to pay such compensation to their entire value, without any opportunity on the part of the owners to be heard ?

The legislature can no more arbitrarily impose an assessment for which property may be taken and sold, than it can render a judgment against a person without a hearing. It is a rule founded on the first principles of natural justice older than written Constitutions, that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard in defense of his rights, and the constitutional provision that no person shall be deprived of these "without due process of law" has its foundation in this rule. This provision is the most important guaranty of personal rights to be found in the Federal or State Constitution. It is a

limitation upon arbitrary power, and is a guaranty against arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty, or property. This the legislature cannot do nor authorize to be done. "Due process of law" is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty or property, whether the proceeding be judicial, administrative, or executive in its nature. *Weimer v. Bunbury*, 30 Mich. 201. This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights.

It is difficult to define with precision the exact meaning and scope of the phrase, "due process of law." Any definition which could be given would probably fail to comprehend all the cases to which it would apply. It is probably wiser, as recently stated by Mr. Justice MILLER of the United States Supreme Court, to leave the meaning to be evolved "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." *Davidson v. Board of Administrators of New Orleans*, 96 U. S. 97; s. c., 17 Albany Law Journal, 223. It may, however, be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing or an opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this. In his argument in the *Dartmouth College* case, 4 Wheat. 519, Webster defined "due process of law" as a proceeding "which proceeds upon inquiry and renders judgment only after trial." Mr. Justice EDWARDS in *Westervelt v. Gregg*, 12 N. Y. 209, defines it as follows: "Due process of law undoubtedly means in due course of legal proceedings according to those rules and forms which have been established for the protection of private rights." Judge COOLEY in his work on Constitutional Limitations, at page 355, after saying that "due process of law" is not confined to ordinary judicial proceedings but extends to all cases where property is sought to be taken or interfered with, says, that "due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs."

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It has always been the general rule in this country, in every system of assessment and taxation, to give the person to be assessed an opportunity to be heard at some stage of the proceeding. That "due process of law" requires this has been quite uniformly recognized.

In *Butler v. Sup'rs of Saginaw*, 26 Mich. 22, where a tax had been imposed for building drains, Judge COOLEY says: "It is not the province of any mere legislative direction to impose pecuniary burdens upon the people. The power to tax is indeed plenary; but taxation implies public interest and in cases like these now in question it also implies proceedings *in pais* in some of which the tax payers have a right to take part and be heard. Any attempt to lay the burden in disregard of these principles must necessarily be inoperative." In *Patten v. Green*, 13 Cal. 325, BALDWIN, J., says: "We think it would be a dangerous precedent to hold that an absolute power resides in the supervisors to tax land as they may choose without giving any notice to the owner. It is a power liable to great abuse. The general principles of law applicable to such tribunals oppose the exercise of any such power." In *Philadelphia v. Miller*, 49 Penn. St. 440, AGNEW, J., speaking of taxation, says: "Notice or at least the means of knowledge is an essential element of every just proceeding which affects rights of persons or property." In *Matter of Trustees of N. Y. Prot. Epis. Public School*, 31 N. Y. 574, Judge DENIO says: "It is manifestly proper that the tax payers should have notice of the imposition proposed to be laid upon them, and an opportunity for making suggestions and explanations to the proper administrative board or office." In *Ireland v. City of Rochester*, 51 Barb. 414, Judge JAMES C. SMITH, speaking of the imposition of assessments, says: "It is in the nature of a judicial proceeding against them, and its effect is to take their property for public use. * * * It is a plain principle of justice applicable to all judicial proceedings, that no person should be condemned, or shall suffer judgment against him without an opportunity to be heard;" and he says that an act assessing "persons without notice transcends the power of the legislature, and is itself void." In *The Matter of Ford*, 6 Lans. 92, Judge GILBERT says: That the duties of assessors in making assessments are of a judicial nature, and that "it is a fundamental rule that in all judicial or *quasi* judicial proceedings, whereby the citizen may be deprived of his property he shall have notice, and an opportunity of a hearing before the proceedings can become effectual." That assessors act

judicially. See, also, *Barhyte v. Shepherd*, 35 N. Y. 238, and *Clark v. Norton*, 49 id. 243.

In *Overing v. Foote*, 65 N. Y. 263, Mr. Commissioner REYNOLDS says: "The general theory under our laws for taxation of property is that the citizen to be affected must have some sort of notice of the proceeding to be had against his property, and that in some form he may be heard, if wrong is apprehended, before any portion of his estate is seized for the support of government; and I think all our laws for the assessment of property for the purpose of taxation are founded upon this notion of justice." In *Davidson's case* in the Supreme Court of the United States above referred to, the doctrine that the citizen is entitled to due process of law in the imposition of assessments is distinctly recognized. In that case, an assessment upon the real estate of the plaintiff in error in the city of New Orleans for draining the swamps of that city was resisted in the State courts and was brought by a writ of error to the United States Supreme Court on the ground that the proceeding deprived the owner of his property without due process of law, and the court refused to interfere with the assessment on the ground that the party assessed had notice and an opportunity to appear before a proper tribunal and contest. Mr. Justice BRADLEY, writing one of the opinions, says: "In judging what is 'due process of law' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessments for local improvements, or none of these; and if found to be suitable or admissible in a special case it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive and unjust, it may be declared to be not due process of law." In *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272, it was held that the provision as to "due process of law" was a restraint on the legislative as well as the executive and judicial powers of the government. Judge COOLEY in his valuable work on Taxation, at page 265, says: "In such proceedings therefore it must be a matter of the utmost importance to the person assessed, that he should have some opportunity to be heard, before the charge is fully established against him; and it would seem to be a dictate of strict justice that the law should make reasonable provisions to secure him as far as may be against partiality, malice or oppression;" and on page 266 he says: "We should say that notice of proceedings in such cases, and an opportunity for a hear-

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ing of some description, were matters of constitutional right. It has been customary to provide for them as a part of what is due process of law for these cases, and it is not to be assumed that constitutional provisions carefully framed for the protection of property were intended, or could be construed to sanction legislation under which officers might secretly assess one for any amount in their discretion, without giving him an opportunity to contest the justice of the assessment."

While it may be said that there is no authority directly in point, yet as has been shown there is much judicial expression in favor of the proposition I am endeavoring to maintain. The cases must have been extremely rare in this country where assessments have been imposed without notice or an opportunity to be heard, and hence the application of "due process of law" to the subject of assessments and taxation has not been much discussed. The case nearest in point is *Davidson's* case. That as has been seen was a case of assessment, and the United States Supreme Court had jurisdiction of it only because it involved the constitutional provision as to "due process of law." If the citizen in the case of assessments is not entitled to the protection of this constitutional provision then the court would have dismissed that case on that ground, but it considered the case upon the merits and decided that there was due process of law.

No case it is believed can be found in which it was decided that this constitutional guaranty did not extend to cases of assessments, and yet we may infer from certain dicta of judges that their attention was not called to it, or that they lost sight of it in the cases which they were considering. It has sometimes been intimated that a citizen is not deprived of his property within the meaning of this constitutional provision by the imposition of an assessment. It might as well be said that he is not deprived of his property by a judgment entered against him. A judgment does not take property until it is enforced, and then it takes the real or personal property of the debtor. So an assessment may generally be enforced not only against the real estate upon which it is a lien; but as in this case against the personal property of the owner also, and by it he may just as much be deprived of his property, and in the same sense as the judgment debtor is deprived of his by the judgment.

We are therefore of opinion, for the reasons stated, that the acts under consideration were unconstitutional and void, and hence that

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no assessment laid under them could be a cloud upon title to land, and that the judgment should therefore be affirmed with costs.

All concur; CHURCH, C. J., FOLGER and MILLER, JJ., concurring in result.

Judgment affirmed.

WOODWORTH V. PAYNE.

(74 N. Y. 196.)

Deed — condition — free church — what is a sale of pews.

A deed of land "for church purposes" contained a condition that if the seats of any church thereon should be "rented or sold" the land should revert. The land, with the church erected thereon, was sold under judicial proceedings to pay debts of the church. *Held*, not a breach of the condition.

EJECTMENT. The land in question was deeded to the trustees of a church, upon a condition set forth in the opinion. The land with the church was afterward sold to defendant under judicial proceedings to pay debts of the church. The defendant had judgment below.

Morris & Russell, for appellant. The deed from Mrs. Selleck must be read as a specific use and for a specific purpose. *Williams v. Williams*, 4 Seld. 525. There was such a breach of the conditions of the grant as entitled plaintiff to enter. *Parmalee v. O. & S. R. R. Co.*, 2 Seld. 80; *Gray v. Blanchard*, 8 Pick. 284. No technical words are required to establish a conditional limitation. *Parmalee v. Oswego & Syracuse R. R.*, 2 Seld. 80; 4 Kent's Com. 124, 233; Gerard's Title to Real Estate, 128, 264; *Mahon v. N. Y. Central R. R. Co.*, 24 N. Y. 661. The object of the grant being clearly limited to the use of the Methodist Protestant Church it reverted as soon as the church alienated or abandoned its use for church purposes. *People v. White*, 11 Barb. 28, 29; *Tinkham v. Erie R. Co.*, 53 id. 394; *Beach v. Nixon*, 5 Seld. 35; *Brown v. Evans*, 34 Barb. 594; *Mayor v. Stuyvesant*, 17 N. Y. 34. Words of perpetuity are not necessary to pass a fee. 1 R. S. 748, § 1. The seats were a part of the church, and passed with it to the grantee. *Trustees First Baptist Church of Ithaca v. Bigelow*, 16 Wend. 28; *Viele v. Osgood*, 8 Barb. 130; *Shaw v. Beveridge*, 3

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Hill, 26 ; *Foots v. West*, 1 Den. 544; 2 Bacon's Abr. 306, title Breach of Conditions; 8 id. 380; Gerard's Title to Real Estate, 123; *Gilbert v. Peteler*, 38 N. Y. 165; *Plumb v. Tubbs*, 14 N. Y. 443; *Mahon v. N. Y. Cent. R. R. Co.*, 24 N. Y. 660; *Hooker v. Minden Turnpike Co.*, 12 Wend. 371; *People v. Bank of Hudson*, 6 Cow. 217; *Bingham v. Weidemoax*, 1 Comst. 509; *DeRuyter v. St. Peter's Church*, 3 id. 238.

M. T. Jenkins, for respondent.

MILLER, J, By the original conveyance of Mrs. Selleck, the grantor, the land therein described passed to the Methodist Protestant Church and to its successors and assigns, subject to the condition therein contained, which declared as follows: "The above described land being designed for church purposes, it is understood and agreed that the seats therein shall be forever free for the use of any and all persons to occupy in the capacity of worship; but if the seats of the said church to be erected thereon, or any other church thereon, shall be *rented or sold*, then the said above described premises shall revert to the said party of the first part or her heirs." We think that the condition contained in the grant was not forfeited by the sale for the payment of debts to the defendant. By its terms the use of the premises is not limited exclusively to the grantees or to any particular denomination of Christians. The grant was evidently for church purposes, and beyond this there was no restriction, except that the seats were to be free and should not be rented or sold. If the grantor had intended that the Methodist Protestant Church alone was to enjoy the franchise conferred, it should have so provided in proper and expressive language which would leave no question in regard to her meaning. In failing to do this, it must be conceded that no such limitation was designed or made, and that the grantor intended to leave the subject of a change of a denominational character to those who might enjoy the franchise granted and to the course of events, without any restriction whatever. If by any means the object of the grantor was perverted from the purpose she had in view, or the church used or appropriated it for any secular or irreligious purposes, then a forfeiture would follow the act, and the land revert back to the heirs of the grantor. Conditions in grants are not favored in law, and hence they must be clearly expressed. *Craig v. Wells*, 11 N. Y. 315. They are also to be construed with great strictness, because they tend to destroy

estates; and the rigorous exaction of them is a species of *summum jus*, and in many cases hardly reconcilable with conscience. 4 Kent Com. 130. Nor are they to be sustained by inference or recital.

Having in view these rules there is no valid ground for claiming that there was an abandonment or misappropriation of the property in contravention of the design of the grantor. The authorities to which we have been referred, as to this branch of the case, do not, we think, uphold any such theory. So long as the building was not used for any other or a different purpose than the grant provided, and the seats were free and neither rented nor sold, it cannot be maintained that the grant was forfeited. The deed to the defendant contains the same condition as the original grant, and he stands in the place of the original grantee, with the same and no other rights, privileges or restrictions.

The plaintiff's counsel also takes the position that the conveyance by the corporation of the fee of the land to the defendant is tantamount to a sale or renting of the pews, and therein works a forfeiture. The argument is that if the sale of a single pew in the church is a forfeiture, then the sale of the fee of the land and the entire property must, of necessity, constitute such forfeiture. And as the greater includes the less, by the sale of the land the seats have been sold, and the right of entry became perfect upon such sale. No such result necessarily follows as a logical consequence of a sale of the land for the very same purposes which were secured by the original grant. The deed does not so provide, and the sale of the whole is not thus restricted. We think it might properly be made, in accordance with the terms of the grant, and the building used for church purposes, under such a sale, without at all infringing upon or violating the provisions as to free seats. As the sale was made, and the deed executed to the defendant, subject to the very same restriction, the condition still continues in full force, and is in no way impaired or violated. The pews still remain free, and nothing has been done to interfere with or prevent their use and occupation as such, or to convert the property to any other than church purposes; nor do the authorities cited by the appellant's counsel sustain the position contended for, in this respect. The grant contains no provision which prohibits a conveyance of the real estate of a church to an individual, and the law does not forbid an individual from holding and owning a church, and renting or allowing the same to be occupied and used for religious purposes.

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So long as it is conducted without violating the terms upon which the grant was made no valid reason exists why a forfeiture should be incurred. Until there is such a breach the grant is not affected or impaired, and the rights acquired by the purchaser, under the same, cannot be disturbed. He does not hold the franchise, nor does the conveyance of the real estate constitute him a body corporate; but the officers of the corporation, with his assent, may occupy and use it, and conduct it in accordance with the terms of the grant. The fee of the land and the use of the pews are placed on a different footing. The former may be transferred, because such transfer is not forbidden and is not inconsistent with either the purpose or the condition of the conveyance. If the pews are disposed of, the condition is violated, the grant becomes void, and the land reverts as provided. The interest in a pew is separate from the fee, and the owner of the former may maintain an action against a trespasser or any person who infringes upon his rights, and they may be leased and held distinct from the fee. *Shaw v. Beveridge*, 3 Hill. 26; *First Baptist Church of Ithaca v. Bigelow*, 16 Wend. 28. This distinction was recognized by the grantor, and it is not apparent how a subsequent conveyance, upon the same terms, can destroy and render such condition inoperative and of no effect. The doctrine which applies where there is an abandonment by a corporation, by which there is a reversion of corporate franchises, cannot affect the question here involved, for a corporation may defeat the possibility of a reverter by an alienation in fee of real estate before a dissolution, although there may have been a reverter upon a dissolution, before a conveyance. *Nicoll v. Erie R. Company*, 12 N. Y. 121-130; 2 Kent's Com. 282.

The evidence introduced for the purpose of showing, that on some occasions there was a refusal, by persons claiming to hold office, to admit members and others into the church edifice, is not sufficiently explicit and certain to warrant the conclusion, that for that reason, the premises granted had been diverted from their original purpose, and that there was a breach of the condition of the grant. The acts complained of appear to have been the result of a church controversy, and we think, do not present any valid ground for holding that they created a forfeiture of the grant.

The judgment of the General Term, for the reasons given, should be affirmed.

All concur.

Judgment affirmed.

JOHNSON V. NATIONAL BANK OF GLOVERSVILLE.

(74 N. Y. 329.)

National bank — usury — discounting business paper.

A National bank, discounting business paper at a greater rate than seven per cent, is liable to the forfeiture of double the excess over seven per cent imposed by the National Banking Act, although the transaction is not usurious under the State law.

ACTION to recover the forfeiture provided by sections 5147, 5198 of the National Banking Act. The point is sufficiently indicated in the opinion. The plaintiff had judgment below.

H. S. Parkhurst, for appellant. The discount of business paper is not within the prohibition of the usury laws of this State. *Cram v. Hendricks*, 8 Wend. 569; *Rapelye v. Anderson*, 4 Hill, 472; *Cobb v. Titus*, 10 N. Y. 198; *Nash v. White's Bank*, 68 id. 396. A National bank has the same right as natural persons to purchase business paper at any rate of discount that may be agreed upon. *Tiffann v. Nat. Bk. of Missouri*, 18 Wall. 409; s. c., *Thompson's Nat. Bk. Cases*, 90; *Hintermeister v. First N. Bank*, 64 N. Y. 216.

C. M. Park, for respondent.

RAPALLO, J. The same point which is raised in this case was made in *Nash v. White's Bank of Buffalo*, 68 N. Y. 396, viz., that the paper discounted being business paper and the transaction not usurious under the general statutes of the State, the bank was not liable under the Banking Act for taking a greater rate of discount than seven per cent per annum thereon. We there held that the character of the paper was not material and that the act applied to all discounts as well as to loans.

That case arose under the State Banking Act of 1870, chap. 163. The provisions affecting this case contained in the United States Banking Act, are identical with those of the State act, except that the latter specifies seven per cent per annum as the rate of interest which may be taken on every loan or discount made, or upon any note, etc., while the act of Congress says that on any loan or discount interest may be taken at the rate allowed by the laws of the

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State where the bank is located, and that when no rate is fixed by the laws of the State, the bank may charge a rate not exceeding seven per centum.

We think that it was the intent of the act of Congress to limit the rate to be taken on the discount of commercial paper to seven per cent in those States where no rate was fixed by law for the interest of money, and where a rate was fixed, to limit the National banks to such rate. In this State the rate of interest on money is limited to seven per cent per annum, and the act of Congress consequently limits the rate of discount to that rate. It is claimed by the appellant that as the State law fixes no limit to the rate which natural persons may take for the discount or purchase of existing business paper, and the taking of discount at a greater rate than seven per cent on such paper is not usurious under the State law, there is no restriction upon the rate which National banks may take on similar discounts. We cannot so construe the act of Congress. It limits the rate of interest to be taken on loan and discounts. If the rate were limited only on loans there might be some plausibility in the argument that the purchase of business paper at a discount did not fall within the limitation. But it distinctly specifies discounts as well as loans, and it is well known that the principal office of banks of discount is to discount the business paper of their customers. The object of the statute was to limit the rate to be charged on these discounts as well as upon loans, and this rate is limited to the rate of interest fixed by the State law, for it says that the National bank may take on any discount interest at the rate allowed by the laws of the State. This, we think, refers to the rate fixed by the State law for interest for the use of money, and not the rate fixed by such law for the discount of commercial paper. If however it should be deemed to refer to the rate fixed for discounts, as well as for the use of money, then as there is no rate fixed in this State for such discounts, the provision of the act of Congress that when no rate is fixed by the laws of the State the banks may take a rate not exceeding seven per cent would apply. That the framers of the act understood that it applied to the discount of business as well as accommodation paper is apparent from the concluding provision of section 5197, viz.: that the purchase, discount or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange for sight drafts

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in addition to the interest, shall not be considered as taking or receiving a greater rate of interest. If the rate to be charged on the discount, purchase or sale of a *bona fide* bill of exchange was not restricted at all by the previous provisions as to discounts, this provision was clearly superfluous. It evidently was understood that such paper was embraced in the restrictions, and the language "purchase discount or sale of a *bona fide* bill" was employed so as to confine the privilege of including exchange in the sum charged for discount, to *bona fide* bills, drawn in the regular course of business, and to prevent its being made available to enable the banks, under the pretext of exchange, to charge additional discount on accommodation bills drawn merely for the purpose of raising money.

The effect of the act was, we consider, to restrict the rate of discount on all paper whether accommodation or business paper to the rate established by the State law for interest for the use of money, and where no such rate was established, to seven per cent per annum. The use of the word "usurious" at the end of section 5198 is not sufficient to govern the construction, and make it appear that the transaction must be usurious under the State law to authorize the recovery back of excessive interest paid. It is used for brevity, with reference to the preceding prohibitions, and a violation of them may be usury under the act of Congress though not under the State law.

The judgment should be affirmed.

All concur, except MILLER and EARL, JJ., absent.

Judgment affirmed.

BIRKBECK V. ACKROYD.

(74 N. Y. 352.)

Marriage — husband's right to wife's separate earnings.

Although the statute authorizes a married woman to appropriate her earnings to her separate use, yet in the absence of evidence of an intention so to appropriate them, the husband is entitled to them.

ACTION for work, labor and services of the plaintiff and his wife, and of that of the wives of the plaintiff's sons, assigned to him. The plaintiff had judgment below. The opinion shows other facts.

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Herbert Godney, for appellant. Plaintiff was not entitled to maintain this action for his wife's services. *Brooks v. Schwerin*, 54 N. Y. 343, 348, 349; Laws 1860, ch. 90, §§ 2, 7; *Adams v. Curtis*, 4 Lana. 164.

W. J. Welsh, for respondent.

ANDREWS, J. By the act chapter 90 of the Laws of 1860, concerning "the rights and liabilities of married women," the common-law doctrine that the husband is entitled to the services and earnings of his wife was essentially modified.

The acts of 1848 and 1849 divested the title of the husband *jure mariti*, during coverture, to the real and personal property of the wife, and enabled her to take from any person other than her husband and hold to her sole and separate use any property or estate and the rents, issues and profits thereof, in the same manner as if she were unmarried. Under these statutes it was held that she had, as incident to her right of property, the power of management and control, and that gains arising in the use of her separate estate, or from business in which she engaged upon the credit of her separate estate, belonged to her and not to her husband. *Knapp v. Smith*, 27 N. Y. 278; *Buckley v. Wells*, 33 id. 518; *Draper v. Stouvenel*, 35 id. 507. But the acts of 1848 and 1849 did not change the rule of the common law giving the husband the right to the services and earnings of the wife, in cases where she had no separate estate, and where her labor was not connected with the use of her separate property. This state of the law left a wife, who might be dependent upon her own labor for her support and the support of her children, without the legal power to control her earnings, and they were subject, as they were before these acts were passed, to be appropriated by the husband.

The hardship of this in cases where the husband was unable or unwilling to support his family, or was idle or dissolute, was apparent. The act of 1860 remedied this defect in the prior laws. By the second section a married woman is authorized "to carry on any trade or business, and perform any labor or services, on her sole and separate account." The section confers upon her the capacity of a *femme sole*, in respect to any business in which she may engage, and empowers her to labor on her own account. But it does not wholly abrogate the rule of the common law. She may still regard her interests and those of her husband as identical, and allow him

to claim and appropriate the fruits of her labor. The bare fact that she performs labor for third persons, for which compensation is due, does not necessarily establish that she performed it, under the act of 1860, upon her separate account. The true construction of the statute is that she may elect to labor on her own account, and thereby entitle herself to her earnings, but in the absence of such an election or of circumstances showing that she intended to avail herself of the privilege and protection conferred by the statute, the husband's common-law right to her earnings remains unaffected. This construction is supported by the language of the first section, which defines what shall constitute the sole and separate property of a married woman, and among other things, "that which she acquires by her trade or business, labor or services, carried on or performed on *her sole or separate account*," and the concluding clause of the second section, which declares that the earnings of any married woman from her trade, business, labor, etc., "shall be her sole and separate property" is to be construed in connection with the preceding section, and as referring to earnings from business or labor conducted or performed on her separate account.

When, therefore, the question arises as to the right of a husband to recover for the labor and services of the wife, it must be determined upon the facts and circumstances of the case. When the labor is performed under a contract with the wife, and by the contract payment is to be made to her, the inference would be strong, if not conclusive of her intention to avail herself of the protection of the statute. So where the wife is living apart from her husband, or is compelled to labor for her own support, or the conduct or habits of the husband are such as to make it necessary for her protection that she should control the proceeds of her labor, the jury might well infer that her labor was performed on her separate account. But where the husband and wife are living together, and mutually engaged in providing for the support of themselves and their family — each contributing by his or her labor to the promotion of the common purpose — and there is nothing to indicate an intention on the part of the wife to separate her earnings from those of her husband, her earnings, in that case, belong, we think, as at common law, to the husband, and he may maintain an action in his own right to recover them. Where the wife is engaged in a business, as that of a trader, and it is conducted in her name, there would be no room to question her right to the avails and profits.

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The duty still rests upon the husband to maintain and support the wife and their children, and it is not necessary, in order to give the wife the protection intended by the statute, to hold that irrespective of her intention, her earnings, in all cases, belong to her and not to the husband, and the language of the act does not admit of this interpretation.

The construction we have given to the statute supports the conclusion of the referee, that the plaintiff was entitled to recover the value of his wife's services. She worked with him and their minor children, in the mill, under no special contract, so far as appears, that he should receive the avails of her labor. The family were supported out of the joint earnings of the family, and the wife has never claimed her earnings as her separate property. Under these circumstances, the plaintiff was entitled to recover their value.

The same considerations apply to that part of the judgment founded upon the services rendered by the wives of the plaintiff's sons — the claim for which was assigned by them to the plaintiff.

There is no other question in the case requiring special consideration.

We think the judgment is right and should be affirmed.

All concur, except MILLER and EARL, JJ., absent.

Judgment affirmed.

MCGAFFIN V. CITY OF COHOES.

(74 N. Y. 357.)

Statute — construction — "liability."

A provision in a city charter that "no action against the city on a contract, obligation, or liability, express or implied, shall be commenced except in one year after the cause of action shall have accrued," does not include actions for torts.*

ACTION of damages for personal injuries caused by the want of repair of a sidewalk. The plaintiff had judgment. The opinion states the case.

Matthew Hale, for appellant, cited Laws 1862, p. 2383, chap. 912, title 13, § 5; *Barton v. City of Syracuse*, 36 N. Y. 54; *Mills v.*

*See, to same effect, *Kelley v. City of Madison* (43 Wis. 698), 28 Am. Rep. 576.

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Brooklyn, 32 id. 489 ; *Lee v. Sandy Hill*, 40 id. 442 ; *Wallace v. Mayor, etc.*, 2 Hilt. 440 ; *Walker v. Lockport*, 43 How. Pr. 366.

N. P. Hinman, for respondent.

CHURCH, C. J. This action is claimed to be barred by the limitation of one year prescribed in the charter of the defendant. Laws of 1869, p. 2383. The last clause of section 5 of title 13 of the charter reads as follows : “ And no action against the city on a contract obligation or liability, express or implied, shall be commenced except within one year after the cause of action shall have accrued.”

The word “ liability ” standing by itself in a literal comprehensive sense would include the cause of action involved in this case, which is an action for damages resulting from negligence in not keeping the sidewalks of the city in proper repair, and the defendant insists that this meaning must be given to it, while the plaintiff contends that the meaning of the words “ contract obligation, or liability ” should be confined to actions for such claims, accounts or demands as are required to be presented for audit, and that it was not intended to include actions for torts. After a careful examination of the question and the authorities bearing upon it, I have arrived at the conclusion that the position of the plaintiff is correct, and I therefore concur in the opinion of the court below.

While it is a well-settled rule that when the language of a statute is unambiguous, the question of construction does not arise, and effect must be given by the courts to its established meaning, the cases are numerous where the literal meaning of words are qualified and limited by courts, by the subject-matter, by the context, the purpose to be attained, and the association in which they are found, in order to carry out the intent and object of the legislature. These rules are not antagonistic. The one requires courts to construe the language of a statute according to its ordinary and approved meaning when it is plain, and there is no circumstance which can legitimately qualify or limit it, while the other requires an examination of surrounding circumstances to the end that arbitrary and literal constructions may be avoided when it is apparent that they were not intended. It would be an unfortunate rule that every word found in a statute must be given the most comprehensive meaning of which it is capable. Words may be necessarily used which aptly express the purpose intended, and yet may be

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made to comprehend much more. It is a legal maxim that "he who considers merely the letter of an instrument goes but skin deep into its meaning." Broom's Legal Max. 658. The learned author observes, that "the meaning of particular words, indeed, in statutes, as well as in other instruments, is to be found, not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object that is intended to be attained."

So words are often used redundantly or repetitiously without strict regard to the meaning of each, but for greater caution to express the full meaning of the principal subject. In such cases the maxim "*noscitur a sociis*" is applied, as in *Corning v. McCullough*, 1 N. Y. 47-69, where it was held that the three years statute of limitation of certain actions upon a statute "for a forfeiture or cause, the benefit and suit whereof is limited to the party aggrieved," should be construed as meaning actions for a forfeiture or cause of action *of the same or like nature* as forfeiture. In the light of these and other familiar rules, the actions described by the language quoted must be regarded as intended to embrace actions upon such claims and demands as are required to be presented for audit to the common council, and it seems reasonably clear that claims for damages for misfeasance, neglect, and the like, were not intended to be embraced. Title 13 in which the clause is found, is entitled "city expenditures," and the *first* section provides that "no account, claim, or demand, shall be audited, allowed or paid by the common council, unless the same was duly authorized by vote." The claim involved in this action could not be allowed, audited, or paid, because it was not and could not be in any proper sense "authorized by vote," unless compromised, and then the original cause of action would be merged. The *second* section requires all resolutions authorizing the expenditure of money, to appropriate specifically the amount to be expended. The *fourth* section requires the common council to examine, and settle, and allow, "all accounts, claims, and demands, chargeable against the city," and the *fifth* section requires "all accounts, claims, and demands against the city" to be presented in writing, specifying the items, and to be verified as therein specified, and provides that all such claims, which are not allowed in whole or in part, shall be barred, unless an action is brought within six months, and then follows the clause in question. The *seventh* section provides that no costs shall be recovered in actions upon claims not presented.

It is manifest, I think, that the whole of this title was intended to treat of matters which relate, as its title imports, to city expenditures, as described, and audit and payment are provided for in the act. All accounts, claims and demands must be presented for audit, properly verified. These must be such as are chargeable against the city, and if they are, the common council must audit and allow them, but they must audit such, and such only as have been authorized by vote. These provisions were clearly intended to provide for the usual expenditures of a municipality, such as for services rendered, work done, or materials furnished, and the like. It would be useless to present such a claim as the one involved in this action, for the reason that there was no authority for either auditing or paying it. The short statute of six months, applicable to accounts presented and rejected in whole or in part, and the one year limitation to accounts not presented, and the *seventh* section prohibiting the recovery of costs in actions upon the last mentioned accounts or claims, must all be regarded from the context, the subject-matter and the object to be attained, as referring to the same class of accounts and claims, viz.: Such as are contemplated to be audited and paid in accordance with the provisions of the charter. It cannot be presumed that the legislature intended to give the city of Cohoes exceptional rights in this respect, in actions upon claims not provided for or embraced within the provisions of the act. These views are sustained by the reasoning in several cases more or less analogous. *Howell v. City of Buffalo*, 15 N. Y. 512; *Quinlan v. City of Utica*, not reported; *McClure v. Bd. of Suprs. of Niagara Co.*, 50 Barb. 594. But I am not prepared to assent to the position that the legal signification of the language, employed aside from the foregoing considerations, would embrace actions of this character. The words "express or implied" apply only to contract obligations, and the use of these words is significant of an intent to confine the limitation to actions upon such obligations. If all actions were intended to be limited, no specification would have been required or inserted. The learned counsel for the defendant could specify two cases only which would not be embraced in his construction of the statute; one was in action to foreclose a mortgage in which the defendant should be made a party as a subsequent incumbrancer, and the other in an action of interpleader. Without stopping to inquire whether both these actions would not be included within the construction

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claimed, it cannot be presumed that the legislature intended to provide an exception for such very unusual actions against a municipal corporation, and especially not without indicating some such purpose. The *first* subdivision of the ninety-first section of the late Code, providing for six years' limitation of actions, contains the same language, and it is claimed that this action would be limited under that subdivision, but I think it would more properly come under the fifth subdivision of that section, "for an injury to the person or rights of another, not arising on contract." As the limitation would be the same under whichever clause embraced, the construction has never, that I am aware, been judicially determined. But the new Code, while retaining the exact language of the subdivision *one*, section ninety-one of the late Code under the six years' limitation, which is the language of the defendant's charter, has expressly provided a three years' limitation by sub. 5, section 383, in "an action to recover damages for a personal injury, resulting from negligence," which is this action. It follows that the legislature did not regard this action as one embraced in sub. 1, section 91, of the late Code, and which was re-enacted as sub. 1 of section 382 of the new Code. Otherwise there would be two periods of limitation for the same action.

I think that the proper construction of this language is to confine it to actions upon contracts, or obligations, or liabilities express or implied, arising from or growing out of contracts, and reading the statute "any contract, obligation or contract liability, express or implied," and that it does not embrace actions for torts. However this may be, I am convinced that this is the proper construction of the language as employed in the defendant's charter.

The judgment must be affirmed.

All concur, except HAND, J., taking no part; MILLER and EARL, JJ., absent.

Judgment affirmed.

LEWIS V. SEABURY.

(74 N. Y. 400.)

Landlord and tenant — lease — good-will — evidence, parol, as to fixtures.

On a lease of an old bakery and the good-will of the business, the lessor vacated the premises and discontinued the business a week or two before the commencement of the term, and removed certain fixtures, and it required

about a week for the lessee to replace the fixtures after taking possession. *Held*, in the absence of evidence that the value of the good-will was thereby injured, no ground of recovery.

In a written lease, silent as to fixtures, it was provided that the lessee should make all necessary "improvements and repairs." For an independent consideration, the lessor agreed that certain fixtures should remain for the lessee's use. An outgoing tenant removed them, and the lessor promised to replace them, but failing to do so, the lessee replaced them at her own expense, and the lessor promised to make it right. *Held*, that parol evidence of the agreement about the fixtures was competent, and the lessee was entitled to recover the sum so expended.

ACTION for injury to good-will and for the expense of replacing fixtures. The opinion states the facts. The defendant had judgment at the trial, which was reversed at the General Term.

John C. Perry, for appellant. If defendant agreed to make repairs not contemplated by the lease it would be void for want of a new consideration. *Walker v. Gilbert*, 2 Robt. 214; *Doupe v. Genin*, 45 N. Y. 119; *Turner v. Van Riper*, 43 How. Pr. 33; *Speckels v. Sax*, 1 E. D. Smith, 253; *Post v. Vetter*, 2 id. 248.

James W. Ridgway, for respondent.

HAND, J. Two causes of action are stated in the complaint. First. That on the 31st of March, 1875, the defendant leased to the plaintiff certain premises in the city of Brooklyn, described in the lease, for three years from the first of May then next. That at the time the lease was executed, the premises were in good order, with gas fixtures, shelving, and other fixtures, suitable and ready for immediate use in the business of a bakery, and the defendant represented to the plaintiff that these were appurtenant and belonged to the premises. That at the commencement of the term, the shelving and fixtures had been removed with the knowledge of the defendant and without the consent of the plaintiff, and the premises were in bad condition. That the defendant promised the plaintiff to replace these things and refit the premises, and the plaintiff entered into possession upon the faith of this promise, but the defendant neglected to replace or refit, and the plaintiff was compelled to and did at the request of the defendant replace some portion, and expended the sum of \$100, which the defendant has not repaid and for which he remains indebted to the plaintiff, "to the damage of the plaintiff of the sum of \$100."

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Second. As a further and separate cause of action, it is alleged that at the time of the lease the defendant agreed to transfer to the plaintiff the good-will of the bakery business, then carried on on the premises, for the price of \$1,000, and the plaintiff purchased the good-will for that price. That the good-will was destroyed by the wrongful acts of the defendant, and the consideration for the \$1,000 wholly failed, to the damage of the plaintiff \$1,000.

There does not appear to have been any amendment of the pleadings at the trial or request for amendment, and if the direction to the case given by the court was correct upon them as they stood, it was not proper for the General Term to reverse.

Assuming that sufficient evidence was given by the plaintiff of a valid contract of sale of the good-will of the business to her, there was no proof of any breach of this contract or any failure of the defendant with regard to it. The plaintiff went into possession, continued the business, enjoying the good-will without interference or diminution for aught that appears, for nearly a year, and then herself sold out, for about \$1,000 in land and money, the good-will, fixtures and lease to another.

A vacating of the premises by the previous tenant a week or two before the commencement of plaintiff's term, and his removal, whether rightful or wrongful, of the fixtures and the necessary employment of workmen by the plaintiff, for "nearly a week," after she took possession, substituting other fixtures for those removed, and refitting the place, cannot be held evidence of a failure of the consideration paid for the good-will, especially in the absence of any proof that the value of the good-will was thereby at all diminished. If it be said that the case shows that Lippincott, the previous tenant, had purchased and owned the good-will of the business during his term, it does not follow that he had or ever claimed any right in it after the expiration of his term and the commencement of that of the plaintiff; and indeed, she, as we have seen, enjoyed it and sold it, without interference or hindrance. to Colwell.

The judge, at the trial, was therefore right in nonsuiting as to the second and principal cause of action of the plaintiff.

As to the first cause of action, there is greater difficulty. It was proved that certain fixtures, in the place at the time of the execution of the lease, had been originally bought by the plaintiff, when previously occupying the bakery, from one Immerschitt, an

earlier tenant ; that she had sold them, with the good-will of her term, to Lippincott, when he came in after her ; and that Lippincott took them off when he left the premises, claiming under the bill of sale from her. The plaintiff also gave evidence tending to show — that when negotiating with the defendant for the present lease, she objected that the fixtures belonged to Lippincott, by his previous purchase from herself, and that perhaps he would take them away ; that the defendant replied that they were annexed to the premises and belonged to him, and she had no right to sell them to Lippincott or the earlier tenant to sell them to her, and that Lippincott should not move them, and he would see that all would be right ; that for this promise, together with the sale of the good-will, she paid the defendant a consideration entirely aside from the rent or any thing stipulated in the lease to be paid by her ; that after Lippincott had removed the fixtures, the defendant again told the plaintiff, before she entered into possession, not to go near the place, and that he would see every thing would be right for her ; and that subsequently, after she had gone into possession and had expended about \$150 in repairing and putting in fixtures, upon his demand of the rent and her refusal at first to pay it, he again said he would make every thing right. All this was strenuously denied by the defendant ; but if sufficient to authorize any specific recovery, raised a question for the jury.

The lease was in writing and contained no stipulation of the defendant as to fixtures, but a clause that the plaintiff should make all “improvements and repairs” necessary to be made on the premises *during the continuance of her term*, and that she should at the end of the term leave on the premises all the repairs and improvements that may have been made or put on the same. It is insisted by the defendant that this writing is conclusive of the contract and precludes any evidence of the oral agreement as to fixtures.

The case is undoubtedly very near the line, but I am inclined to think that such parol agreement was a separate and independent one, touching a subject not covered by the lease, and made for an independent consideration paid by the plaintiff, not stipulated for or referred to in the lease. The promise that certain specific fixtures then on the premises should be retained and remain there, so that the plaintiff might enjoy the benefit of them, if she took the lease, may be sustained as a previous distinct collateral agreement upon

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a collateral and independent consideration, which did not merge in the subsequent written contract of hiring. See *Erskine v. Adeane*, L. R., 8 Ch. App. 756; *Hope v. Balen*, 58 N. Y. 380. The case is distinguishable from such cases as *Johnson v. Oppenheim*, 55 N. Y. 280, where the parol agreement necessarily affected the premises themselves, and if admitted would have varied the terms of the instrument as to the identical property leased.

It is insisted, however, by the defendant that there is no proof but that the fixtures were so annexed to the building as to belong to the defendant as he claimed, and consequently that he did give good title to the plaintiff, and she could have recovered them from Lippincott or restrained him from removing them. But on the trial, the defendant distinctly disclaimed, on oath, being the owner or having any claim upon the things removed by Lippincott, and stated he presumed Lippincott to be the owner.

On the whole, therefore, I am led to the conclusion that the evidence did authorize the jury to find that there was a breach of a valid contract by the defendant and a cause of action arising thereon. It is not necessary to decide that the amount expended by the plaintiff in putting in the new fixtures, which she afterward sold to Colwell with the lease, furnishes any measure of the damages she is entitled to recover for the breach of this contract of the defendant.

The nonsuit being wrong as to the first cause of action, the order for a new trial must be affirmed, with judgment absolute, upon that cause of action, against the defendant, under his stipulation.

All concur, except MILLER and EARL, JJ., absent.

Order affirmed and judgment accordingly.

WHEELER V. RUTHVEN.

(74 N. Y. 428.)

Will—rule as to interest upon legacies—when controlled by circumstances.

A will gave twenty-one legacies, and directed that if testatrix's estate should be insufficient to pay all, the first fifteen should be first paid, and the balance applied *pro rata* to the rest. The only estate of the testatrix was a residu-

ary interest in property subject to a life estate. The life tenant survived the testatrix, and when she died, the first fifteen legacies with interest from a year from the death of the testator amounted to more than the whole residuary estate. *Held*, that the legacies drew interest only from the death of the life tenant.

SETTLEMENT of an executor's account. The opinion states the facts.

J. Edgar, for appellant. The property of the testatrix being derived by legacy in her father's will became vested in her at and from the time of his death. *Birdsall v. Hewlitt*, 1 Pai. 32. Interest on each legacy should run from the expiration of one year from the death of the testatrix. *Williamson v. Williamson*, 6 Pai. 300; *Dayton on Surrogates*, 465; *Williams on Executors* (5th ed.), 1284-1286; *Willard on Executors*, 355-390; 2 *Roper on Legacies*, 1251; *Hepburn v. Hepburn*, 2 Brad. 74; *Lawrence v. Embree*, 3 id. 364; *Bradner v. Faulkner*, 12 N. Y. 472; *Campbell v. Cowdrey*, 31 How. 172.

Charles Edward Souther, for respondent.

ANDREWS, J. This case involves the consideration of the rule governing the right to interest on legacies, and the question is presented under peculiar circumstances. The testatrix, an unmarried woman, died October 28, 1862, leaving a will dated August 20, 1862, by which she gave twenty-one general legacies, amounting in the aggregate to \$31,500, and directed that in case her real and personal estate was insufficient to pay all the legacies, the first fifteen legacies (amounting together to \$28,500) should be first paid, and that the balance of her estate, if any, should be applied to the payment, *pro rata*, of the six remaining legacies. The niece of the testatrix, who was also one of the fifteen legatees first named to whom general legacies were given, was made residuary legatee. The estate of the testatrix consisted solely of a residuary interest under the will of her father in a fund of about \$30,000, and in the undivided half of a house and lot, in the city of New York, in which his widow, the mother of the testatrix, was by the same will given a life interest. The mother survived the testatrix, and died in 1874, and the executors of her daughter then came into possession of the residuary estate. The appellant is one of the fifteen legatees first named in the will, and on the accounting by the

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executor before the surrogate in 1877 claimed that she was entitled to a decree for the payment of her legacy, with interest thereon from the expiration of one year after the death of the testatrix,—that is to say, from October 28, 1863. The surrogate rejected this claim and decided that the legacies were not payable until the death of the life tenant, and that interest thereon did not commence to run until the happening of that event.

The general rule is well settled that where a general legacy is given without assigning any time for payment, it bears interest from the expiration of a year after the death of the testator. This rule has been established for convenience and is founded upon the presumption that within that time the executor will have been enabled to ascertain the condition of the estate, to collect the assets, and be prepared to pay the legacies. The rule, says Lord REDESDALE in *Pearson v. Pearson*, 1 Sch. & Lef. 10, is taken from the practice of the ecclesiastical courts, where a year is given to the executor to collect the effects, and he cannot be called upon to pay before because he cannot know until that time what fund there is to pay. It is founded, says Lord ELDON, in *Sitwell v. Bernard*, 6 Ves. 539, upon convenience “because as a general rule it may be taken, that the personal estate may be collected within a year.”

It is a legitimate consequence of an omission by the executor to pay a legacy when payment is due, that the legacy should bear interest from that time, as a compensation for the delay; and therefore the time when the legacy is payable determines the time from which interest commences. Roper on Legacies, 1245. The rule that a legacy is payable one year after the testator's death only applies in the absence of a direction in the will controlling the general rule established by the courts, or other decisive indication in the instrument, interpreted in the light of the surrounding circumstances of a different intention on the part of the testator. The will is to govern where it speaks upon the subject, and the time of payment may be accelerated or postponed at the will of the testator. But the rule does not yield to doubtful indications in the will of an intention of the testator at variance with it. As where a legacy is given, payable out of money due on a mortgage “when recovered,” the legacy will be deemed to be payable after the lapse of a year, and will bear interest from that time, and the right to interest will not be postponed, in case the executor has not meanwhile been able to collect the security. *Wood v. Penoyre*, 13 Ves.

326. A legacy, according to the general rule, will be payable and bear interest after a year from the testator's death, although, by reason of the deficiency of assets, the inability of the executor to collect the debts, or other accidental circumstances, payment at that time may be impracticable. *Wood v. Penoyre* ; *Sitwell v. Bernard* ; *Williams on Executors*, 1285.

The question we are to decide is whether the legacies in this case are to be deemed due and payable at the end of the year from the testatrix's death, so as to bear interest from that time, according to the general rule, or are they taken out of the general principle by the will and the surrounding circumstances. If the legacies are deemed to be due and to bear interest after a year, and the interest, as well as the principal of the preferred legacies, is to be first paid, nothing will be left with which to pay the six remaining legacies, as the whole estate will be absorbed in the prior payments. It would be a question worthy of consideration, assuming that the legacies became due at the end of the year, whether the priority given by the will to the first fifteen legacies attaches to the interest which should accrue by delay of payment, and whether the subsequent legatees would not be entitled to be paid the principal of their legacies before applying the estate to satisfy the accrued interest on the primary legacies. But we do not deem it necessary to decide this point, for the reason that the decree of the surrogate may be affirmed on the ground that the legacies did not become payable so as to bear interest until the falling in of the life estate of the testatrix's mother. The will does not in terms refer to the time when the legacies are payable, or direct that they shall be paid with interest. It must be assumed that the testatrix understood the condition of her property, and that until the death of her mother, she or her representatives could have no beneficial enjoyment of her estate, and that meanwhile the life tenant was entitled to the possession and the whole income. When the life estate would terminate was uncertain. It might terminate within a year after the death of the testatrix, or continue, as in fact it did, for several years after that period. There was no fund out of which the legacies could be paid during the life-time of the mother. The very nature and character of the estate of the testatrix prevented earlier payment. No want of diligence on the part of the executor in getting in the assets, or any resistance on the part of debtors, could have any influence in delaying payment,

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so long as the life estate was outstanding. The mother surviving the daughter, there was no basis for the presumption on which the rule that a legacy is payable within a year after the testator's death is founded. It was impossible that the executor could get in the assets within a year, unless the mother should happen to die within that time, and there was no ground for the presumption of her death at any particular period.

The circumstances of the case fairly lead to the inference that the testatrix designed and intended that the legacies should be paid when, by the death of her mother, her estate should vest in possession, and that she did not intend that the legacies should draw interest during the pendency of the life estate, while her estate was earning no interest, and when an allowance of interest might result in depriving a part of her legatees of any benefit under the will.

We have been referred to no authority bearing directly upon the question in this case. The general rule established by the courts in respect to interest on legacies has been modified to meet the supposed intention of the testator, as in case of a legacy given to a child by way of maintenance. The case, as was stated in the outset, is a peculiar one, and we proceed in deciding it upon its special circumstances. All the parties waited until the death of the life tenant before making any claim upon the executor, and as the fund only became available at that time, we think, under the circumstances of this case, the legacies are to be considered as then becoming due and payable.

The judgment should be affirmed.

All concur, except MILLER and EARL, JJ., absent.

Judgment affirmed.

JORDAN V. NATIONAL SHOE AND LEATHER BANK.

(74 N. Y. 467.)

Bank — lien upon deposit — set-off — equitable right of.

A bank has no lien upon a customer's deposit for his indebtedness to the bank not yet due.

In the absence of facts entitling it to equitable relief, a bank in an action by the administrator of its deceased customer to recover a deposit due to the intestate in his life, cannot set off a claim against the deceased not due until after his death, the statute of set-off not permitting such a course.

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ACTION by an administratrix to recover a balance of a deposit account of the intestate with the defendant bank. The answer set up a claim of offset by way of a protested note made by the intestate, and discounted for him by the defendant, and credited in his account, but not maturing until after his death; the note exceeding in amount the amount of the deposit at the time of his death. The defendant had judgment on the trial, which was reversed at General Term.

Henry N. Beach, for appellant. Independent of defendant's lien under the law merchant it was entitled to set off its demand *pro tanto*. 2 R. S. of N. Y. 1829, 355, §§ 23, 24; *Rawson, Adm'r, v. Copland*, 3 Barb. Ch. 166; *Patterson v. Patterson*, 59 N. Y. 574, 581; R. S. of N. H., ch. 187, § 5; *Matthewson, Adm'r, v. Strafford Bk.*, 45 N. H. 108; R. S. of Mass., ch. 96, § 12; Gen. Stat. of Mass., ch. 130, § 12; *McDonald v. Webster*, 2 Mass. 498; *Jarvis v. Rogers*, 15 id. 407; *Knapp v. Lee*, 3 Pick. 452; *Bordman v. Smith*, 4 id. 215; *Bigelow v. Folger*, 2 Metc. 255; *Phelps v. Rice*, 10 id. 132; 2 R. S. 355, § 25; *Hills v. Tallman*, 21 Wend. 674; *Morse on Banks*, 41; *Ætna Nat. Bk. v. Fourth Nat. Bk.*, 46 N. Y. 82; s. c., 7 Am. Rep. 314; *Chapman v. White*, 6 N. Y. 412; *Root v. Taylor*, 20 Johns. 137; *Fry v. Evans*, 8 Wend. 530, 532; *Mercein v. Smith*, 2 Hill, 210; *Merritt v. Seaman*, 6 N. Y. 168; *Ketchum v. Miln*, Selden's Notes, 152. As plaintiff's cause of action accrued before the death of the intestate, the defendant is entitled to set off its demand. *Rawson v. Copland*, 3 Barb. Ch. 166; *In the Matter of Denny*, 2 Hill, 223; Bacon's Abr., Release (I) Litt., § 508; Co. Litt. 291, b; *Edward Altham's case*, 8 Rep. 299; *Vedder v. Vedder*, 1 Den. 261; Bacon's Abr., Release (I), citing Coke Jac. 300; *Brown v. Holyoak*, Bull. N. P. 179; s. c., 8 Viner's Abr. 562; s. c., Wiles, 263; *Leggett v. Bank of Sing Sing*, 24 N. Y. 286; *Allen v. H. R. Mut. Ins. Co.*, 19 Barb. 445; *Jones v. Robinson*, 26 id. 310; *New Am. Sav. Bank v. Tartter*, 4 Abb. N. C. 215; *Rees v. Watts*, 11 Exch. 410; *Dale v. Cooke*, 4 Johns. Ch. 13. Equity demands that the defendant's set-off be allowed in the case at bar. 2 Kent's Com. 632, note; *Duncan v. Lyon*, 3 Johns. Ch. 358; *Patterson v. Patterson*, 59 N. Y. 581; s. c., 17 Am. Rep. 384.

Wellesley W. Gage, for respondent.

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FOLGER, J. [Omitting a question of pleading.] The defendant further contends that it had and continues to have a banker's lien on the balance of deposit sued for. There is spoken of in the books what is termed a banker's lien, but it is not a right to retain the balance of a customer's deposit, to pay or apply upon an indebtedness of his to the bank, not yet matured. The passage quoted by the defendant from Morse on Banks: "The rule may be broadly stated, that the bank has a general lien on all moneys and funds of a depositor in its possession, for the balance of the general account," is too broadly stated, and needs the limitation that the balance of that account must be then due and payable. A lien is a right of one to retain property in his possession belonging to another, until certain demands of him in possession are satisfied. *Hammonds v. Barclay*, 2 East, 227-235. But mere possession does not give the right. It must arise from contract or operation of law. There was no contract for a lien, in this case. Nor did the law operate to give one. It would be in complete hostility to the whole purport and contemplation of the contract of discount. The purpose existing and understood by the parties in that act is, that the customer of the bank may draw out at his pleasure the avails of the discount. After the paper discounted falls due and payable and remains unpaid, unless other rights have intervened, the bank may hold a balance of deposits and apply it toward the payment of the paper. But these deposits in a bank create between it and the depositor the relation of debtor and creditor. *Commercial Bank of Albany v. Hughes*, 17 Wend. 100; *Ætna National Bank v. Fourth National Bank*, 46 N. Y. 82. Now a debtor in one sum has no lien upon it in his hands, for the payment of a debt owned by him, which has not yet matured; nor has a bank, more than any other debtor. Both hold, as debtors, the moneys of their creditors, and may set up no claim to them not given by the law of set-off, counter-claim, recoupment or kindred rules. *Beckwith v. Union Bank*, 4 Sandf. Sup. Ct. 604; s. c. affirmed, 9 N. Y. 211; *Giles v. Perkins*, 9 East, 12.

It is also contended that equity will permit and enforce a set-off of a debt not yet due, in cases where by the statute and at law it cannot be claimed. Doubtless the power to compel a set-off of debts was exercised by equity, prior to, and independent of, any statute on the subject. *Ex parte Stephens*, 11 Ves. 24; *Ex parte*

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Flint, 1 Swanst. 30. But equity follows the statute and the law, unless there are peculiar circumstances presented. 11 Ves., *supra*; *Bathgate v. Haskin*, 59 N. Y. 537. Insolvency of a party sometimes moves equity to grant a set-off, which would not be allowed at law; and that consideration much moved the court in *Ford's Executor v. Thornton*, 3 Leigh, 695, cited for the defendant. But no equitable case is made in this action, at the trial, nor is any fact averred in the answer, on which to found equitable jurisdiction.

The case finds a bottom then on our statute of set-off. 2 R. S. 355, § 23. It is, in the relation of the claims of the parties, the reverse of *Patterson v. Patterson*, 59 N. Y. 574; s. c., 17 Am. Rep. 384. An executrix was plaintiff there, as an administratrix is here, but there the plaintiff's cause of action arose on a claim which was not due and payable until after the death of the testator; while the demand of the defendant there, which he sought to set-off, was owned by him in the life-time of the testator and was due and payable before the testator's death. In the case in hand, the plaintiff's cause of action arises on a demand owned by the intestate in his life-time, and due and payable to him then; while the promissory note which the defendant seeks to set off, though owned by it in the life-time of the intestate, was not due and payable until after his death. But we do not think that this difference makes the rule laid down in that case any the less applicable here. It was shown there, that the right to set-off at law did not exist before the English statute of 2 George II, chapter 22, which was amended somewhat by 8 George II, chapter 24; and that the law of set-off prescribed in our Revised Statutes, 2 R. S. 354 *et seq.*, is, in substance, the same as the statutes of England. *Fry v. Evans*, 8 Wend. 530; *Hills v. Tallman's admr.*, 21 id. 674. It was shown there, that the rule was established in England, that none but mutual debts could be set off against one another, and that by mutual debts was meant those which on each side were, at the time, due and payable; it was deduced from the weight of authority in this State that the same rule exists here. Impressed by the earnest argument of the learned counsel for the appellant, we have revised our reasoning in *Patterson v. Patterson*, *supra*, but are unable to come to a different conclusion. We think that the statute, 2 R. S. 355, § 24, means that for a demand to be set off against an executor or administrator, in an action brought by him, it must have been due and payable from the decedent in his life-time.

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We have examined the books cited for the appellant from the New Hampshire and Massachusetts reports. *Matthewson, adm'r, v. Strafford Bank*, 45 N. H. 108, is in accord with the position of the appellant. The opinion in that case compares the statute of set-off of New Hampshire with that of Massachusetts, and finds them substantially alike; and citing some of the cases from the reports of the latter State, which are cited for the appellant here, declares that the right of set-off would be clear under the Massachusetts statute. But there does not seem to have been enough effect given to the fact, that of the Massachusetts cases it was stated by SHAW, C. J., in *Bigelow v. Folger*, 2 Metc. 255, that they did "not stand upon the law regulating set-off generally, but upon the law respecting the settlement of insolvent estates." And it may be remarked, that the New Hampshire case is also, in another part of the opinion, put upon the insolvent laws of that State, which, it is there said, "extend much farther to claims not due at the time of set-off."

[Omitting a minor consideration.]

We are constrained to affirm the order appealed from.

The rule we maintain will not work hardship. If the estate of the decedent is solvent, the creditor has only to await distribution or bring his cross action. If there are any circumstances existing which render it inequitable to deny him a set-off, he may set them up in the action on the demand against himself, and invoke the equity power of the court.

The order should be affirmed, and judgment absolute rendered for plaintiff on stipulation with costs.

All concur, except MILLER and EARL, JJ., absent.

HAND, J., concurs on the ground of *stare decisis*.

Order affirmed, and judgment accordingly.

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(74 N. Y. 509.)

Constitutional law — "civil damages" act — liability of lessors.

A statute enacting that the lessor of premises, with knowledge that they are to be used for the sale of intoxicating liquors, is liable for damage caused by the act of one intoxicated by liquor sold there, is constitutional.*

* See note, 25 Am. Rep. 302.

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ACTION against the lessor of a hotel for damage caused by the act of one intoxicated by liquors sold there. The opinion states the facts. The plaintiff had judgment below.

Lewis E. Carr, for appellant. The civil damage act, so far as it gives a right of action for damages against the owner of the building in which the intoxicating liquors were sold, is unconstitutional. *Powers v. Bergen*, 6 N. Y. 358, 367; *Wilkinson v. Leland*, 2 Peters, 627; *Taylor v. Porter*, 4 Hill, 140; *In the Matter Albany St.*, 11 Wend. 149; *Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 id. 9. It takes his property against his will for private use. 1 Blackst. 138; 1 Bouv. Inst. 181, 182, 183; *Wynehamer v. People*, 13 N. Y. 387; Opinion COMSTOCK, J., 396, 397, 398; *Williams v. N. Y. C. R. R. Co.*, 16 id. 97; *Glover v. Powell*, 10 N. J. Eq. 211; *Morgan v. King*, 35 N. Y. 454; *Palairot's Appeal*, 67 Penn. St. 479; s. c., 5 Am. Rep. 450; *Eaton v. Concord, etc., R. R. Co.*, 51 N. H. 504; s. c., 12 Am. Rep. 147. It is unconstitutional because it deprives the owner of the building of the freedom from liability for the tenant's acts which belongs to other landlords. *Taylor v. Porter*, 4 Hill, 140, 145, 146; *Wynehamer v. People*, 13 N. Y. 387; Opinion COMSTOCK, J., 392, 393, 394, 395; *Westervelt v. Gregg*, 12 id. 209, 322, Pott. Dwar. on Statutes, 430; *Burch v. Newbury*, 10 N. Y. 374, Opinion JEWETT, J.; *Marbury v. Madison*, 1 Cr. 137; *Parsons v. Russell*, 11 Mich. 113; *Baker v. Pope*, 2 Hun, 556; *Hayes v. Phelan*, 4 id. 733; *Jackson v. Brookins*, 5 id. 530; Laws of 1873, ch. 583, p. 895; *People v. Parkes*, 15 How. 551; *People v. Erwin*, 4 Den. 129. The owner of property that may be damaged either by willful or negligent acts of another can look for redress only to the proximate cause, that is, the one doing the injury. *Ryan v. N. Y. C. R. R. Co.*, 35 N. Y. 210; *McCafferty v. Spuyten Duyvil, etc., R. R. Co.*, 61 id. 178; s. c., 19 Am. Rep. 267; *City Buffalo v. Holloway*, 7 N. Y. 493; *Webb v. R., W. & O. R. R. Co.*, 49 id. 420; s. c., 10 Am. Rep. 389; *Hayes v. Phelan*, 4 Hun, 732.

W. J. Groo, for respondent.

ANDREWS, J. This and other cases which have been argued and are awaiting the decision of the court present the question of the constitutionality of the "act to suppress intemperance, pauperism and crime," passed April 29, 1873, commonly known as the civil damage act. Some of the cases are actions against the vendors

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of liquors sold to be drank by the purchasers, and causing intoxication and consequential injury to the plaintiffs. This action is brought by the plaintiff against the defendant, as the landlord of hotel premises, let with knowledge that intoxicating liquors were to be sold therein by the lessee, to recover the value of a horse owned by the plaintiff, which died in consequence of having been overdriven by the plaintiff's son while in a state of intoxication, produced in part by liquor sold him by the lessee at his bar on the leased premises. The essential facts, as established by the verdict of the jury, may be briefly stated.

The defendant when the act in question was passed was the owner of a hotel building and premises. In June, 1875, he leased them to one Firnhaber, knowing that the lessee intended to occupy the building for a hotel and boarding-house, and sell intoxicating liquors therein. The lessee entered into possession and opened a bar in the hotel, and with the defendant's knowledge commenced selling liquors therefrom. On Sunday, July 18, 1875, the plaintiff's son, who was residing with his father, informed him that he had some business with a person residing about four miles from the father's residence, and thereupon, with the plaintiff's knowledge, took his horse and buggy and drove away.

He did not go to the place where he informed the plaintiff he intended to go, but went to the village where Firnhaber's hotel was located, and to the hotel, and there purchased and drank whiskey several times at the bar, and then drove to a neighboring village and drank again, and returned to Firnhaber's, drinking again on his return. He became, in consequence of these repeated potations, intoxicated, was arrested for disorderly conduct in the streets, and after being detained in custody for a time, was discharged, and in the evening started for home, and the horse soon after it reached the plaintiff's house died. The jury have found, and the evidence fully justifies the finding, that it died from overdriving by the plaintiff's son, and that his treatment of the horse was caused by his intoxication.

Firnhaber had no license to sell intoxicating liquors. It was understood between him and the defendant, when the lease was made, that a license was to be procured, and the defendant informed him that he would see that he had one. The plaintiff's son was of intemperate habits, and at one time had been an inmate of an inebriate asylum. The plaintiff recovered a verdict for the value of the horse.

It cannot be disputed that the facts found bring the case within the terms of the statute and authorize the recovery, if the law itself is valid. The act gives to every husband, wife, parent, guardian, employer or other person, "who shall be injured in person or property or means of support by any intoxicated person or in consequence of the intoxication" of any person, a right of action against any person who shall by selling or giving away intoxicating liquors have caused the intoxication, in whole or in part, and declares that "any person or persons, owning or renting or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold thereon, shall be liable, severally and jointly with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained and for exemplary damages." All the elements of the landlord's liability under the act exist in this case, viz.: the leasing of premises with knowledge that intoxicating liquors were to be sold thereon; the sale by the tenant, producing intoxication, and the act of the intoxicated person, causing injury to the property of the plaintiff.

The question we are now to determine is whether the legislature has the power to create a cause of action for damages, in favor of a person injured in person or property by the act of an intoxicated person, against the owner of real property, whose only connection with the injury is that he leased the premises where the liquor causing the intoxication was sold or given away, with knowledge that intoxicating liquors were to be sold thereon.

To realize the full force of this inquiry it is to be observed that the leasing of premises to be used as a place for the sale of liquors is a lawful act, not prohibited by this or any other statute. The liability of the landlord is not made to depend upon the nature of the act of the tenant, but exists irrespective of the fact whether the sale or giving away of the liquor was lawful or unlawful, that is, whether it was authorized by the license law of the State, or was made in violation of that law. Nor does the liability depend upon any question of negligence of the landlord in the selection of the tenant, or of the tenant in selling the liquor. Although the person to whom liquor is sold is at the time apparently a man of sober habits and so far as the vendor knows, one whose appetite for strong drink is habitually controlled by his reason and judgment, yet if it turns out that the liquor sold causes or contributes to the intoxication of the person to whom the sale or gift is made, under

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the influence of which he commits an injury to person or property, the seller and his landlord are by the act made jointly and severally responsible. The element of care or diligence on the part of the seller or landlord does not enter into the question of liability. The statute imposes upon the dealer and the landlord the risk of any injury which may be caused by the traffic. It cannot be denied that the liability sought to be imposed by the act is of a very sweeping character, and may in many cases entail severe pecuniary liability, and its language may include cases not within the real purpose of the enactment. The owner of a building who lets it to be occupied for the sale of general merchandise, including wines and liquors, may, under the act, be made liable for the acts of an intoxicated person, where his only fault is that he leased the premises for a general business, including the sale of intoxicating liquors, in the same way as other merchandise. The liability is not restricted to the results of intoxication from liquors sold or given away to be drunk on the premises of the seller. There is no way by which the owner of real property can escape possible liability for the results of intoxication where he leases or permits the occupation of his premises, with the knowledge that the business of the sale of liquors is to be carried on on the premises, whether alone or in connection with other merchandise, or whether they are to be sold to be drunk on the premises or to be carried away and used elsewhere. His only absolute protection against the liability imposed by the act is to be found in not using or permitting the premises to be used for the sale of intoxicating liquors.

The question whether the act under consideration is a valid exercise of legislative power is to be determined solely by reference to constitutional restraints and prohibitions. The legislative power has no other limitation. If an act can stand when brought to the test of the Constitution the question of its validity is at an end, and neither the executive nor judicial department of the government can refuse to recognize or enforce it. The theory that laws may be declared void when deemed to be opposed to natural justice and equity, although they do not violate any constitutional provision, has some support in the *dicta* of learned judges, but has not been approved, so far as we know, by any authoritative adjudication, and is repudiated by numerous authorities. Indeed, under the broad and liberal interpretation now given to constitutional guaranties, there can be no violation of fundamental rights

by legislation which will not fall within the express or implied prohibition and restraints of the Constitution, and it is unnecessary to seek for principles outside of the Constitution, under which such legislation may be condemned.

The main guaranty of private rights against unjust legislation is found in that memorable clause in the Bill of Rights, that no person shall "be deprived of life, liberty or property without due process of law." Const., art. 1, § 6. This guaranty is not construed in any narrow or technical sense. The right to life may be invaded without its destruction. One may be deprived of his liberty in a constitutional sense without putting his person in confinement. Property may be taken without manual interference therewith or its physical destruction. The right to life includes the right of the individual to his body in its completeness and without dismemberment; the right to liberty, the right to exercise his faculties and to follow a lawful avocation for the support of life; the right of property, the right to acquire power and enjoy it in any way consistent with the equal rights of others and the just exactions and demands of the State.

The comprehensive scope of the guaranty of private property finds many illustrations in judicial decisions in our State. The limit placed upon the power of taxation is an instance. The right of taxation is an attribute of sovereignty, without which governments would be powerless, and organized society could not exist, and it is said to be unlimited. But this is only true when it is exercised for a public purpose. The taking of private property for a private purpose, under the guise of taxation, is no less a violation of the Constitution than if the property of A. was attempted to be transferred to B. by the mere force of a legislative mandate. It is upon this principle that we have recently held, in the case of *Weismer v. Village of Douglass*, 64 N. Y. 92; s. c., 21 Am. Rep. 586, that a law involving taxation in aid of a private enterprise and business was unconstitutional and void. In *Wynhamer v. The People*, 13 N. Y. 378, the sanctity of private property, and the efficiency of constitutional guaranties for its protection, under whatever guise it is attempted to be assailed by legislation, was most ably and amply vindicated. The provisions in the act then under consideration were held to deprive persons owning intoxicating liquors, at the time of its passage, of their property, although their title might not be affected by the act, or the property itself, in

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its material substance, taken or destroyed. "There may," says MILLER, J., in *Pumpelly v. Green Bay Co.*, 13 Wall. 177, "be such serious interruption to the common and necessary use of property as will be equivalent to a taking, within the meaning of the Constitution;" and this observation is warranted by the general tenor of judicial authority.

Admitting, as we do, the soundness of this view, and fully approving it, we come back to the proposition that no law can be pronounced invalid, for the reason simply that it violates our notions of justice, is oppressive and unfair in its operation, or because, in the opinion of some or all of the citizens of the State, it is not justified by public necessity, or designed to promote the public welfare. We repeat, if it violates no constitutional provision, it is valid and must be obeyed. The remedy for unjust or unwise legislation, not obnoxious to constitutional objections, is to be found in a change by the people of their representatives, according to the methods provided by the Constitution.

There are two general grounds upon which the act in question is claimed to be unconstitutional; *first*, that it operates to restrain the lawful use of real property by the owner, inasmuch as it attaches to the particular use a liability, which substantially amounts to a prohibition of such use, and as to the seller, imposes a pecuniary responsibility, which interferes with the traffic in intoxicating liquors, although the business is authorized by law; and *second*, that it creates a right of action unknown to the common law, and subjects the property of one person to be taken in satisfaction of injuries sustained by another remotely resulting from an act of the person charged, which act may be neither negligent nor wrongful, but may be, in all respects, in conformity with law. The act, it is said, in effect authorizes the taking of private property without "due process of law," contrary to article 1, section 6, of the Constitution, and is also a violation of the first section of the same article, which declares that "no member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to any of the citizens thereof, unless by the law of the land or the judgment of his peers." If the act is "due process of law," within the sixth section of the first article, it is manifest that it is valid within the other section to which reference is made.

The right of the State to regulate the traffic in intoxicating

liquors, within its limits, has been exercised from the foundation of the government, and is not open to question. The State may prescribe the persons by whom and the conditions under which the traffic may be carried on. It may impose upon those who act under its license such liabilities and penalties as in its judgment are proper to secure society against the dangers of the traffic and individuals against injuries committed by intoxicated persons under the influence of or resulting from their intoxication.

The licensee, by accepting a license and acquiring thereby a privilege from the State to engage in the traffic, a privilege confined to those who are licensees and withheld from all other citizens, takes it subject to such conditions as the legislature may attach to its exercise. He consents to be bound by the conditions when he accepts the license, and the State is the sole judge of the reasonableness of the conditions imposed. And the power of the legislature, as a part of the excise system, to impose the liabilities, imposed by the act in question, upon licensed dealers, as a condition of granting the license, cannot, we think, be questioned. A party cannot object, upon constitutional grounds, to a liability which he has voluntarily assumed, in consideration of a benefit conferred, and one may renounce even a constitutional provision made for his own benefit.

The extent to which the legislature has heretofore gone, in imposing restrictions or liabilities upon licensees, may be seen by reference to the excise law of 1857 (ch. 628), many provisions of which are to be found in earlier legislation. Section 10 prohibits the sale of liquor on credit to any persons other than lodgers, and avoids all securities taken therefor. Section 19 gives a penalty of fifty dollars to a wife against a dealer in intoxicating liquors, who shall sell or give intoxicating liquor to a husband after complaint made and notice given, as provided by the section, and a like penalty is given, under similar circumstances, for selling or giving away intoxicating liquor to a wife or minor child. Section 28 contains the germ of the act now under consideration. It provides that any person who shall sell strong or spirituous liquors to any of the individuals to whom it is declared by the act unlawful to make such sale, "shall be liable for all damages which may be sustained, in consequence of such sale," to be recovered by the party sustaining the injury or by the overseers of the poor for his benefit.

The act of 1873 cannot, however, be sustained in all its aspects upon the theory that the liability imposed by the act is a con-

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dition of a privilege granted by the State. This cannot be affirmed in respect of the liability of the landlord, whose right to lease his property belongs to him, as an incident to ownership. The responsibility imposed is not confined to cases of unlawful sales of liquors or to sales made by licensed vendors. Any person selling or giving away liquor, which causes intoxication and consequent injury, is made liable, under the act.

The broad question is presented, whether the act transcends the limits of legislative power, in subjecting a landlord to liability, under the circumstances mentioned in the act. Does the act, in effect, deprive him of his property without "due process of law," in the sense of the Constitution? If the act can be sustained as to the landlord, it is clearly valid as to all other persons; and its validity as to the landlord is the question directly presented in this case.

We need not enter into any elaborate discussion of the meaning of the words "due process of law." This has been done in numerous judicial decisions. They are held, under the liberal interpretation given to them, to protect the life, liberty and property of the citizens against acts of mere arbitrary persons, in any department of the government. DENIO, J., in *Westervelt v. Gregg*, 12 N. Y. 212. These are the fundamental civil rights, for the security of which society is organized, and all acts of legislation which contravene them are within the prohibition of the constitutional guaranty. In judicial proceedings, due process of law requires notice, hearing and judgment; in legislative proceedings, conformity to the settled maxims of free governments, observance of constitutional restraints and requirements, and an omission to exercise powers appertaining to the judicial or executive departments. It is as difficult, as it would be unwise to attempt an exact definition of their scope. Their application, in a particular case, must be determined when the question arises, and in the absence of exact precedents, courts must determine the question, upon a consideration of the general scope of legislative power, the practice of governments, and in view of the conceded principle that individual rights may be curtailed and limited to secure the public welfare and the equal rights of all. "Due process of law," in each particular case, means," says Judge COOLEY, "such an exertion of the powers of government as the settled maxims of the law sanction, and under safeguards for the protection of individual rights as those maxims prescribe for the

class of cases to which the one in question belongs." The right to life, liberty and property is not absolute or uncontrollable. The qualification in the Bill of Rights implies that there may be a deprivation of those rights by due process of law, and governments could not be maintained, in the absence of the power somewhere to regulate the relations of individuals to the State and to each other. Life, liberty or property may be forfeited for crime. Private property may be taken for public use, on condition of compensation, or by taxation, or it may be transferred by judicial process, for the satisfaction of private contracts or as a compensation for private wrongs and injuries.

The purpose of the act in question, as indicated by its title, is the suppression of "intemperance, pauperism and crime." It cannot be denied that these are public purposes within the legitimate scope of legislation, nor can it be doubted by any observing and intelligent person that the use of intoxicating liquors is the fruitful source of many of the evils which afflict society. Pauperism, vice and crime are the usual concomitants of the unrestrained indulgence of the appetite for strong drink. Impoverishment of families, the imposition of public burdens, insecurity of life and property are consequent upon the prevalence of the great evil of intemperance. If the legislature was impotent to deal with the traffic in intoxicating liquors or powerless to restrain or regulate it in the interest of the community at large, because legislation on the subject might, to some extent, interfere with the use of property or the prosecution of private business, the legislature would be shorn of one of its most usual and important functions. But as we have said, the right of the legislature to regulate the traffic is shown by the uniform practice of the government. It may not only regulate, but it may prohibit it. This was declared after solemn argument and mature deliberation, in one of the propositions adopted by this court in *Wynehamer v. The People*, subject only to the qualification that the prohibition shall not interfere with vested rights of property. The same principle was declared in the case of *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; and that the legislative power extends to the entire prohibition of the traffic has been recently recognized by the Supreme Court of the United States.

It is quite evident that the act of 1873 may seriously interfere with the profitable use of real property by the owner. This is

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especially true with respect to a building erected to be occupied as an inn or hotel, and specially adapted to that use, where the rental value may largely depend upon the right of the tenant to sell intoxicating liquors. The owner of such a building may well hesitate to lease his property, when by so doing he subjects himself to the onerous liability imposed by the act. The act in this way indirectly operates to restrain the absolute freedom of the owner in the use of his property, and may justly be said to impair its value. But this is not a taking of his property within the meaning of the Constitution. He is not deprived either of the title or the possession. The use of his property for any other lawful purpose is unrestricted, and he may let or use it as a place for the sale of liquors, subject to the liability which the act imposes. The objection we are now considering would apply with greater force to a statute prohibiting, under any circumstances, the traffic in intoxicating liquors, and as such a statute must be conceded to be within the legislative power, and would not interfere with any vested rights of the owner of real property, although absolutely preventing the particular use, *a fortiori* the act in question does not operate as an unlawful restraint upon the use of property.

That a statute impairs the value of property does not make it unconstitutional. All property is held subject to the power of the State to regulate or control its use, to secure the general safety and the public welfare. "We think it is a settled principle," says Chief Justice SHAW, in *Com. v. Alger*, 7 Cush. 84, "growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property nor injurious to the rights of the community. All property is held subject to those general regulations which are necessary to the common good and general welfare." Judge REDFIELD, in a passage often cited with approval, speaking of the police power, says: "By this general police power of the State persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the State; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles can be made." *Thorpe v. R. & B. R. R. Co.*, 27 Vt. 140. The police power so called inheres in every sovereignty, and is essential

to the maintenance of public order and the preservation of mutual rights from the disturbing conflicts which would arise in the absence of any controlling, regulating authority, and has been constantly exercised by the legislature in a great variety of cases. We need not enumerate the subjects in relation to which this power has been exercised. We shall content ourselves by referring to two cases recently decided by the Supreme Court of the United States, to show how far courts have gone in upholding legislation affecting private rights and property, as a due exercise of the police power residing in the State. Those cases are *The Slaughter-house cases*, 16 Wall. 36, and *Munn v. The State of Illinois*, 4 Otto, 114. The first case involved the question of the validity of a statute of Louisiana, passed in 1869, granting to a corporation created by the act the exclusive right for twenty-five years to have and maintain slaughter-houses, landings for cattle, and yards for inclosing cattle intended for sale or slaughter, within the parishes of Orleans, Jefferson and St. Bernard, a territory containing over a thousand square miles, including the city of New Orleans and a population of several hundred thousand persons, and prohibiting all other persons from building, keeping or having slaughter-houses, landings or yards for cattle intended for sale or slaughter within these limits, and requiring that all cattle and other animals intended for sale or slaughter within that district should be brought to the yards and slaughter-houses of the corporation, and authorizing the corporation to exact certain fees for the use of its wharves and for each animal slaughtered. It appeared that when the act was passed there were within this territory a thousand or more persons engaged in the preparation and sale of animal food, many of whom owned slaughter-houses and yards used in the prosecution of their business. The act was entitled "An act to protect the public health," etc., and the court held it valid, as a police regulation. That the act seriously interfered with the prosecution of a lawful business by a large number of people and greatly impaired the value of slaughter-house property is evident. But the majority of the court were of opinion that the act was not void, either as creating a monopoly or as depriving the persons affected by it of their property, within the meaning of the Constitution. In *Munn v. The State of Illinois*, the court sustained the act of the legislature of Illinois, prescribing a maximum rate of charges for the handling of grain, in warehouses in that State, and requiring warehousemen to procure a license, and

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authorizing its revocation, and prohibiting the carrying on the business of warehousing grain, in any warehouse, without such license, or after its revocation. The act was held to be valid, as well as to warehouses built before as to those which might be built after the act was passed. The right of the State to make the regulations contained in the acts was put upon the ground that the subject was one involving the public interest and the general welfare. WAITE, C. J., in delivering the opinion of the court, said : "When one devotes his property to a use in which the public have an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created." These cases may perhaps be deemed to have carried the right of legislative interference with private rights and property to its utmost limit, but they illustrate the scope of the police power in legislation ; and the reports abound in decisions which show that the State has authority to regulate the use and enjoyment of property and the control of private business, in many ways, "without coming in conflict with any of those constitutional principles which are established for the protection of private rights or private property."

The right of the legislature to control the use and traffic in intoxicating liquors being established, its authority to impose liabilities upon those who exercise the traffic, or who sell or give away intoxicating drinks, for consequential injuries to third persons, follows as a necessary incident. And the act of 1873 is not invalid because it creates a right of action and imposes a liability not known to the common law. There is no such limit to legislative power. The legislature may alter or repeal the common law. It may create new offenses, enlarge the scope of civil remedies, and fasten responsibility for injuries upon persons against whom the common law gives no remedy. We do not mean that the legislature may impose upon one man liability for an injury suffered by another, with which he had no connection. But it may change the rule of the common law, which looks only to the proximate cause of the mischief, in attaching legal responsibility, and allow a recovery to be had against those whose acts contributed, although remotely, to produce it. This is what the legislature has done in the act of 1873. That there is or may be a relation, in the nature of cause and effect, between the act of selling or giving away intoxicating

liquors, and the injuries for which a remedy is given, is apparent, and upon this relation the legislature has proceeded in enacting the law in question. It is an extension, by the legislature, of the principle expressed in the maxim, "*Sic utere tuo ut alienum non laedas*," to cases to which it had not before been applied, and the propriety of such an application is a legislative and not a judicial question.

It is said that the statute imposes a liability for the consequences of a lawful act. But the legislature, having control of the subject of the traffic in and use of intoxicating liquors, may make such regulations to prevent the public evils and private injuries resulting from intoxication as in its judgment are calculated to accomplish this end. It may prohibit the selling or giving away of liquors, or it may, while not interfering with the liberty of sale or use, guard against the dangers of an indiscriminate traffic and induce caution on the part of those who engage in the business by subjecting them to liabilities for consequential injuries.

The act of 1873 does not deprive the seller who is made liable under the act of his property without due process of law. It authorizes it to be appropriated in the due course of judicial proceedings for the satisfaction of injuries resulting from intoxication caused by his act. The legislature has said that the seller may be treated as the author of the injuries, and we think this was within the legislative power.

The liability imposed upon the landlord for the acts of the tenant is not a new principle in legislation. His liability only arises when he has consented that the premises may be used as a place for the sale of liquors. He selects the tenant, and he may, without violating any constitutional provision, be made responsible for the tenant's acts connected with the use of the leased property. In *Dobbins v. The United States*, 96 U. S. 395, a distillery, with the real and personal property used in connection therewith, had been seized and condemned to be forfeited for the violation by a lessee of certain provisions of the act of Congress regulating the business of distilling. No fraud was imputed to the owner of the premises, and he was not charged with any complicity with the tenant in violating the law. The owner objected that his property could not be forfeited for the acts of the tenant, committed without his knowledge or consent. But the court affirmed the decree of condemnation; and in his opinion, CLIFFORD, J., says: "The legal conclusion must be that the unlawful acts of the distiller bind the

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owner of the property, in respect to the management of the same, as much as if they were committed by the owner himself. Power to that effect the law vests in him by virtue of his lease, and if he abuses his trust it is a matter to be settled between him and his lessor; but the acts of violation as to the penal consequences to the property are to be considered just the same as if they were the acts of the owner."

Our conclusion is that the act of 1873 is a constitutional enactment. It is doubtless an extreme exercise of legislative power, but we cannot say that it violates any express or implied prohibition of the Constitution.

There are some subordinate questions presented as grounds for the reversal of the judgment. They were considered by the General Term, and we concur in its conclusions in respect to them.

The judgment must be affirmed with costs.

All concur.

Judgment affirmed.

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(74 N. Y. 526.)

Civil damage — injury to means of support — plaintiff's minor son.

In an action under the civil damage act, for injury to the plaintiff's means of support, by the intoxication of the plaintiff's minor son by liquors sold by the defendant, whereby the son was incapacitated for the services he had been accustomed to render his father, and the father had been subjected to expense for medical attendance, etc.; *held*, that there could be no recovery without proof that the services were necessary to the father's support, or that the expenses had so diminished his means as to render them inadequate for his support.

ACTION under the civil damage act. The opinion states the case. The plaintiff had judgment below.

Samuel Hand, for appellants.

Edward C. James, for respondent.

ANDREWS, J. The question of the constitutionality of the civil damage law has been decided at this term in the case of *Bertholf v. O'Reilly*.* The additional question in this case relates to the right of the plaintiff, upon the facts proved, to recover damages for in-

* *Ante*, page 323.—Rep.

jury to his means of support. The plaintiff's minor son, a young man about twenty years of age, living with his father, in September, 1874, went to Ogdensburg and procured, at various hotels and saloons in that place, intoxicating liquors, and becoming intoxicated, fell and injured his head. In consequence of the debauch and injury he became sick, and for several months was confined to his bed, in his father's house. The plaintiff was subjected to medical and other expenses of the son's illness, and was deprived, during the time, of the services which the son had been accustomed to render him upon his farm. The defendants sold to the son a part of the liquor which caused his intoxication. The plaintiff owned and cultivated a farm of over 100 acres. There is no other evidence of his pecuniary condition. It does not appear whether he depended for his support upon the proceeds from the farm, or that the labor of the son was necessary for that purpose, or that the charges to which he was subjected, by reason of the son's illness, diminished his income below the amount required for his support. Upon this state of facts, the defendant's counsel, at the close of the proof, requested the court to charge the jury that the *onus* was upon the plaintiff of proving that he had sustained damage, in his means of support, by reason of the intoxication and consequent illness of the son, and that no proof that he had sustained such damage had been given. The court refused so to charge, and the defendant's counsel excepted. We think the exception was well taken.

One of the grounds urged in support of this exception is that the injury, for which an action lies under this statute, must be one for which, by the pre-existing law, a remedy by action existed. It is claimed that the act does not create a cause of action for an injury not before remediable by action, and that the only change wrought by the act was to extend the pre-existing remedy, so as to make the vendor of liquors and the landlord, under the circumstances specified in the act, liable for injuries committed by an intoxicated person, instead of confining the remedy to the immediate wrong-doer, according to the general rule of the common law. This construction of the statute is inadmissible.

Both direct and consequential injuries are plainly included in the remedy given, and the legislature, by giving a right of action for injury to "means of support"—a cause of action unknown to the common law—evidently intended to create a new ground and right of action. The case of a husband, having a wife and family de-

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pendent upon him for support, and who, by reason of intoxication, becomes incapacitated to labor, and neglects to provide for them, or squanders his substance, and reduces thereby his family to penury and want, is within the act, although the facts would not constitute an actionable injury before the statute. It is quite plain that cases of this kind were in the contemplation of the legislature. The words, "means of support" in connection with the designation of the persons, in whose favor the remedy is given, viz.: husband, wife, child, parent, etc., denote that it was not alone a common law injury, or an injury before remediable by action, to which the statute was intended to apply. The exception cannot therefore be sustained upon the ground first stated.

But we think the exception was well taken, for the reason that there was no evidence that the plaintiff was injured in his "means of support," by or in consequence of the intoxication of his son, within the meaning of the statute. The words are new in legal enactments, and have no settled legal meaning. We shall not undertake to define the cases to which they apply. Their scope can best be determined as the cases arise. But we are of opinion that where injury to "means of support" is the gravamen of the action, the plaintiff, in order to maintain the action, must show that by or in consequence of the intoxication or the acts of the intoxicated person, his accustomed means of maintenance have been cut off or curtailed, or that he has been reduced to a state of dependence, by being deprived of the support which he had before enjoyed; and that, in this case, the plaintiff cannot recover for loss of service or the expenses of his son's illness, under the words "means of support," without proof that the services were necessary to his support, or that the charge brought upon him, by his son's illness, diminished his means, so as to render them inadequate therefor.

The primary purpose of the legislature, in giving a right of action for an injury of this character, was the protection of the dependent and helpless. Diminution of income, or loss of property, does not constitute an injury to means of support, within the fair intentment of the statute, if the plaintiff, notwithstanding his adequate means of maintenance, from accumulated capital or property, or his remaining income is sufficient for his support.

For the error of the court, in refusing to charge as requested, the judgment should be reversed, and a new trial ordered.

All concur.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

FOSTER'S APPEAL.

(87 Penn. St. 67.)

Will — lost — probate upon — parol evidence of.

If a testator dies leaving an unrevoked will, which cannot be found after his death, parol evidence is competent to prove its contents, and as thus proved it may be admitted to probate.

A **PPEAL** from a decree admitting a will to probate. The opinion states the facts.

J. M. Moyer, George J. Purdy and F. Carroll Brewster, for appellants. A testator having taken his will into his custody, if it cannot be found after his death the presumption is that he destroyed it. Wharram v. Wharram, 33 L. J. P. 75; Keen v. Keen, 42 id. 61; Johnson v. Lyford, 37 id. 65; Loxley v. Jackson, 3 Phill. 128; Brown v. Brown, 8 Ell. & Bl. 876; Betts v. Jackson, 6 Wend. 173. In order to make a will effective it must be shown to have been in existence at the testator's death. Baptist Church v. Robbarts, 2 Barr. 110; Jones v. Murphy, 8 W. & S. 275; Clark v. Morton, 5 Rawle, 235. The contents of a will can be established by parol testimony only where it is clearly shown that the will was lost or destroyed without the agency of the testator. Clark v.

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Wright, 3 Pick. 67; *Idley v. Bowen*, 11 Wend. 227; *Steele v. Price*, 5 B. Monr. 68.

H. M. Seeley and *George G. Waller*, for appellees. 1. If a will be lost, or destroyed otherwise than by the act of the testator, and satisfactory evidence of its execution and contents be offered, such contents will be admitted to probate. *Trevelyan v. Trevelyan*, 1 Phill. 149; *Davis v. Davis*, 2 Addams, 226; *Patten v. Poulton*, 1 Swab. & Tris. 55; *Clark v. Wright*, 3 Pick. 67; *Dickey v. Malecki*, 6 Mo. 182; *Dawson v. Elizabeth Smith's Will*, 3 Houst. 335; *Minkler v. Minkler*, 14 Vt. 125; *Youndt v. Youndt*, 3 Grant, 140; *Jackson v. Holloway*, 7 Johns. 394. Declarations of the testator are admissible to rebut this presumption. *Boudinot v. Bradford*, 2 Dall. 266; *Burns v. Burns*, 4 S. & R. 297; *Will of John Cooke*, 10 Pa. L. J. 355; *Wikoff's Appeal*, 3 Harris, 292; *Havard v. Davis*, 2 Binn. 425; *Youndt v. Youndt*, 3 Grant, 140; *Grant v. Grant*, 1 Sandf. Ch. 235; *Johnson's Will*, 40 Conn. 587; *Durant v. Ashmore*, 2 Rich. 184; *Gaines v. New Orleans*, 6 Wall. 659; *Steele v. Price*, 5 B. Monr. 68; *Weeks v. McBeth*, 14 Ala. 474; *Goodtitle v. Otway*, 2 H. Bl. 516; *Welch v. Phillips*, 1 Moore's P. C. C. 302; *Sugden v. Lord St. Leonards*, L. R., 1 P. Div. 154.

AGNEW, C. J. That Isaac P. Foster made and executed in due form of law a will in writing, on or about the 5th of June, 1875, is an indisputable fact. That the contents of this will are clearly and fully proved, both by testimony and by written memoranda in the testator's own handwriting, is equally plain, and no question arises as to the number of witnesses, the contents being proved by two, as well as by the memoranda furnished by the testator himself. The will not being found after the testator's death and diligent search, two material questions arise upon the assignment of errors:

1. Whether the presumption of revocation by the testator himself is rebutted by the evidence.

2. Whether the contents can be proved by parol evidence.

There is ample evidence to rebut the presumption of a revocation by the testator. Many facts contribute to this result, among which these leading circumstances appear. Isaac P. Foster was never without a will for the last fifteen years of his life, having had seven written under the supervision of counsel and made necessary by the nature and amount of his estate, the number of his children, and advancements made to some, and those matters were often dwelt

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upon by himself. He, himself, regarded his will of 1875 as existing until and while lying on his death-bed, when too feeble to destroy it without assistance. Up to this time he made efforts to procure a codicil to alter the will in a certain aspect, made necessary by the failure in the payment of interest on certain bonds, but being prevented by the extremity of his last illness, died under a belief that he had arranged with his executors to pay these legatees money instead of the bonds. These and corroborating circumstances show that the testator had no thought of a revocation.

That the presumption of a personal revocation can be thus rebutted is shown by the authorities cited by the appellees. The presumption of revocation arises from the fact that the will was known to be in the possession of the testator himself, and that it cannot be found after his death. It is, therefore, a natural presumption merely, because it cannot be supposed the testator would part with it, unless he intended to put it out of the way, and because it is out of the way and cannot be accounted for, the presumption that he intended to revoke it arises. Like other natural presumptions drawn from evidence, and not declared *de jure*, for some legal end, it must give way to stronger evidence of the continued existence of the will, and the testator's reliance upon it as the disposition he had made of his property.

The will then being in existence at the death of the testator unrevoked by him, its loss or accidental destruction differs not from the loss or destruction of any other solemn instrument, such as a deed, a note or bond, or a record. The contents, therefore, may be proved in like manner, as shown by the authorities cited. It is a postulate of the question that the testator left behind him at death, a last will in writing, legally executed and published, and unrevoked by any act or direction of his. That the law will not tolerate any making of a will for him by other means than his own act in writing duly executed, is clear. But such a will having a legal existence, yet accidentally lost or destroyed, the establishment of its contents is not the making of a new will, but a restoration merely of that which the testator himself made and left behind him to govern his estate. There is no greater sanctity, in this respect, than the restoration by parol evidence of other instruments equally solemn and having an equal effect in the disposition of property. The law simply comes in aid of his own legally performed act, to prevent his intentions from being frustrated or de-

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frauded. The authorities upon the republication of wills, made before the passage of the act of 1833, have a bearing and may therefore be cited—some not appearing in the paper-books: *Havard v. Davis*, 2 Binn. 406; *Jones v. Hartley*, 2 Whart. 103, citing many cases; *Campbell v. Jamison*, 8 Barr. 498; *Jack v. Shoenberger*, 10 Harr. 416; *Fransen's Will*, 2 Casey, 203. We cannot perceive that the learned judge erred in ruling either point.

[Omitting a point of local interest.]

We discover no other matter worthy of serious notice.

The decree of the Orphans' Court is therefore affirmed, and the appeal of the appellants dismissed at their costs, which they are ordered to pay.

Judgment affirmed.

BLETZ V. COLUMBIA NATIONAL BANK.

(87 Penn. St. 87.)

National bank—jurisdiction of State courts in actions to recover illegal interest from.

State courts have jurisdiction of actions to recover illegal interest reserved by National banks upon loans.*

ACTION of debt to recover double the amount of illegal interest or discount paid by plaintiff on loans by the defendant, a National bank. The opinion sufficiently states the case. The defendant had judgment below.

J. F. Frueauff, Samuel Reynolds and George M. Kline, for plaintiff in error.

H. M. North, for defendant in error. The exaction of twice the amount of interest is a penalty. Burrill's Law Dictionary, *Penalty*; Curtis's Com., § 247; *First National Bank of Plymouth v. Price*, 33 Md. 487. Therefore the statute must receive a strict construction. *Tiffany v. National Bank of Missouri*, 18 Wall. 410. Congress cannot constitutionally give to State courts jurisdiction

* See to same effect, *Ordway v. Cent. Nat. Bank of Baltimore* (47 Md. 217), 28 Am. Rep. 445; *Dow v. Irasburgh Nat. Bank of Orleans* (50 Vt. 112), 28 Am. Rep. 493; *Gruber v. First Nat. Bank of Clarion*, 87 Penn. St. 465.

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over cases of penalties inflicted solely by the laws of the United States. *Jackson v. Rose*, Gen. Court of Va., 9 Niles' Reg., sup. 173 2 Va. Cas. 34; *Commonwealth v. Feely*, 1 id. 321; *U. S. v. Campbell*, TAPPEN, J., in Ohio, 10 Niles' Reg. 405; Tappan, 29; *State v. Rutter* (Almeida's case), Balt. Co. Court, 12 Niles' Reg. 115, 231; *U. S. v. Lathrop*, 17 Johns. 4; *Teall v. Felton*, 1 Comst. 537 (affirmed, 12 How. 28½); *Ely v. Peck*, 7 Conn. 239; *Davison v. Champlin*, 7 id. 244; *State v. Tuller*, 34 id. 280; *Haney v. Sharp*, 1 Dana, 442; *Ward v. Jenkins*, 10 Metc. 587; *Martin v. Hunter's Less.*, 1 Wheat. 337; *Gelston v. Hoyt*, 3 id. 312, 328, 334; *State v. McBride*, Rice (S. C.) 400; *Prigg v. Pennsylvania*, 16 Pet. 617, 618, 664; *Sim's Case*, 7 Cush. 302, 303, 308; *Moore v. People of Illinois*, 14 How. 20, 22; 3 Story on Const., § 1750; 1 Kent's Com. 403-404; *Miss. Tel. Co. v. First National Bank*, 74 Penn. St. 217; 7 Chicago Leg. News, 158; 1 Kent's Com. 403; 3 Story's Com. on Constitution, § 1750.

AGNEW, C. J. The question before us is, whether a State court has jurisdiction in "an *action of debt*" (in the language of the National Bank Act) "to *recover back* twice the amount of the interest thus paid, from the association taking or receiving the same;" that is to say, when illegal interest is taken contrary to its provisions. The 30th section of the act of Congress of June 3d, 1864, allows National banks to charge and take interest at the rate allowed by the laws of the State where they are located, and no more, and then proceeds: "And the knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid, shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back in an action of debt twice the amount of the interest thus paid from the association taking or receiving the same."

Bearing in mind the words of the act, that a right of action, in debt, is given to the debtor and those who represent him only, and not to the government or the public, let us see what reason would prevent the action from being brought in a State court, to recover back money paid to the extent of twice the interest paid. The question is most important to the people who are citizens alike un-

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der both State and National governments, for if they are driven into the Federal courts, the evil will be a monstrous one. The National banks are intended to do the business of the country in the midst of the people, just as others lending money and discounting paper do, whose places they have filled everywhere. They can sue and be sued in the State courts on all business done by them, secure themselves, and purchase under State laws for the sale of property, and enjoy the advantages of State laws as fully as our own citizens. Therefore, unless the Federal jurisdiction is *exclusive* it is clear that even in a doubtful case our decision should be favorable to our own jurisdiction, leaving the doubt to be solved by the Federal judiciary; for if our judgment be against it, the citizen has no appeal to the Federal courts. If, however, the Federal jurisdiction be clearly exclusive, it is our duty so to declare, for the laws of the United States are our laws, and are "the supreme laws of the land, and the judges in every State shall be bound thereby." The relations of the States and the United States are so clearly defined in two recent decisions, none others need be cited: *Farmers' and Mechanics' Bank v. Dearing*, 1 Otto, 29; *Claffin v. Houseman*, 3 id. 130. Justice SWAYNE says in the former, "that this law is as much a part of the law of each State, and as binding upon its authority and people as its own Constitution and laws." In the latter, Justice BRADLEY, quoting Alexander Hamilton, says: "When in addition to this we consider the State governments, and the National government, as they truly are, in the light of kindred systems, and as parts of one whole, the inference seems to be conclusive that the State courts would have concurrent jurisdiction in all cases arising under the laws of the Union where it was not expressly prohibited." The learned justice then shows that the Judiciary Act of September 24th, 1789, was framed in this view, giving exclusive jurisdiction to the Federal courts in certain cases of National import, and concurrent in certain others of doubtful. A large mass of subjects was thereby left, which necessarily fell into the hands of the State courts having jurisdiction over similar subjects. Thus the rights and wrongs of individuals growing out of the laws of Congress were left to be enforced and redressed concurrently. This line of *civil* remedies for *individuals* is one clearly marked; but the courts of the United States have gone even beyond it. Thus in *Houston v. Moore*, 5 Wheat. 1, a Pennsylvania case, it was held that the State court had jurisdiction.

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to enforce an act of Congress upon a delinquent under the act for the Organization and Training of the Militia; "not (says Justice BRADLEY) but that these courts might exercise jurisdiction in cases authorized by the laws of the State and not prohibited by the exclusive jurisdiction of the Federal courts." So in a suit in a State court against a postmaster for neglect of duty to deliver a newspaper under the postal laws of the United States, the jurisdiction was affirmed. *Teal v. Felton*, 12 How. 292. And indeed the legislation of Congress for the removal of causes from the State court into the Federal is founded on the admitted jurisdiction of the former.

We may now refer to some of our own decisions and laws. Thus it was held that our courts had jurisdiction of a forgery of a power of attorney to obtain a pension under an act of Congress. *Commonwealth v. Schaffer*, 4 Dall. xxvii. In *White v. Commonwealth*, 4 Binn. 418, this court decided that the passing a counterfeit note of the Bank of the United States was indictable under the act of 22d April, 1794, specially including the notes of that bank. *Buckwalter v. U. S.*, 11 S. & R. 193, was the case of a penalty under an act of Congress, sued for in the name of the United States. Justice DUNCAN said: "On the matter of jurisdiction, it is sufficient to observe this court has often sustained actions on penal acts of Congress, where the penalty is recoverable in the State courts, and though convenience is no justification for the usurpation of power, yet as the court does not see how this conflicts with the Constitution of the United States, the inconvenience may be considered, and it would be an intolerable inconvenience and grievance in an action for a penalty to drag a man from the most remote corner of the State to the seat of the Federal judiciary." The remark of Justice STRONG in *Huber v. Reily*, 3 P. F. Smith, 118, was not intended to overrule *Buckwalter's* case, but to distinguish it, as shown by his own language, that the latter was an action for penalties *declared to be recoverable as other debts*, while he was treating of the disfranchisement of a deserter and the necessity of conviction by a court-martial before the disability could be enforced. The case of *Houston v. Moore* has been already cited, where a penalty was inflicted under an act of Congress by a State court-martial. The legislation of our State has run in the same direction. In 1829 Judge KING, Thomas I. Wharton and Judge SHALER reported the penal act of that year. The act of 23d April, 1829, provided

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for forging and uttering any gold or silver coin then or thereafter passing or in circulation in this State, and for forging, counterfeiting or uttering a counterfeit note of the Bank of the United States. In 1860 the same great criminal lawyer, Judge KING, with Judge KNOX and another, was upon a commission to codify the criminal law, and reported the new sections of the act of 31st March, 1860, from 156 to 163, inclusive, punishing offenses relating to the coin, and in the report referred to the laws of the United States and the case of *Fox v. Ohio*, 5 How. 410, deciding upon an elaborate argument, that the clauses of the Constitution of the United States relating to the power to coin money and regulate its value do not prevent the State from enacting a law to punish the offense of passing counterfeit coin of the United States. These laws have remained unquestioned; yet I do not assert that none of the provisions applied to the coin of the United States can be questioned. In view of *Fox v. Ohio* and other cases, there may be a doubt whether the provisions against making and debasing these coins can be sustained as to the question of jurisdiction. This, however, does not touch the present inquiry, which concerns only the *civil* jurisdiction of the State courts. In our sister States the power to maintain an action in the name and behalf of the United States for a penalty has been denied. *U. S. v. Lathrop*, 17 Johns. 4, a case relied on by the defendant in error, may be taken as an example; but Justice BRADLEY, in *Clafin v. Houseman*, *supra*, comments on this case, and remarks that the State courts having declined the jurisdiction does not militate against the weight of the argument, referring, with apparent approbation, to the dissenting opinion of Justice PLATT. The result of the discussion, in the language of the learned justice, is to affirm the jurisdiction when it is not excluded by express provision or by incompatibility in its exercise arising from the nature of the particular case.

The question of jurisdiction may be resolved now by an examination of the precise nature of the case before us. We have seen that there are two provisions in the thirtieth section of the law. By the first, the taking, receiving or charging a rate of interest greater than is allowed, "shall be held and adjudged a forfeiture of the entire interest." It will be noticed that the word *forfeiture* is used, yet the uniform practice has treated this not as pure penalty, but as a defense which may be set up to the recovery of interest. *Lucas v. Govt. Nat. Bank*, 28 P. F. Smith, 231; s. c., 21 Am.

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Rep. 17; *Overholt v. Nat. Bank of Mt. Pleasant*, 1 Norris, 490. The word *forfeiture* is viewed simply as conferring a *right* which may be asserted by the defendant.

The second clause on which this case rests is, where "a greater rate of interest *has been paid*, the person paying the same, or his *legal representatives*, may *recover back*, in an action of *debt*, twice the amount of the interest *thus paid*, from the association *taking or receiving* the same." Here we find no declaration of a forfeiture as such, but a provision to recover back money paid in an action of debt. This vests a right in the borrower of reclamation in a common-law form of action, to be brought by himself and in his own right. It is not a penalty to be adjudged to the United States, or vested in the public, for which any citizen may sue. The form of action is within the jurisdiction of the State court, and the right claimed in this form is private, belonging to the borrower alone. It is therefore immaterial whether the source of the right is a State or Federal law. In either case it is a law binding on the State, which has given birth to the right. On this point the language of the court in *Clafin v. Houseman* has marked pertinency. "Every citizen of a State is a subject of two distinct sovereignties having concurrent jurisdiction in the State—concurrent as to place and person, though distinct as to the subject-matter. Legal or equitable rights acquired under either system of laws may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its Constitution in the exercise of such jurisdiction." Again, the opinion says there is "no reason why the State courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent and not denied." Whatever doubts, therefore, have been expressed by some State courts as to penalties to be sued for by the United States, or some one in their behalf, in order to vindicate the Federal law, they do not extend to the case before us of a private right sued for by the citizen for himself. The debtor having paid his debt with usury may "recover back" twice the amount of the interest paid in a State court. It is in this sense it was said in *The Farmers' and Mechanics' Nat. Bank v. Dearing*, 1 Otto, 35, that the thirtieth section of the law is *remedial*, and to be liberally construed to effect the object Congress had in view in enacting it. This view has been taken by the Maryland Court of Appeals in

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Ordway v. Cent. Nat. Bank of Baltimore, 47 Md. 217; s. c., 28 Am. Rep. 455. The able opinion of Judge ALVEY discusses the subject very fully.

Judgment reversed and a venire facias de novo awarded.

MILLER V. HANOVER JUNCTION & SUSQUEHANNA RAILROAD CO.

(87 Penn. St. 95.)

Contract — subscription to joint stock — parol evidence to show unperformed secret condition.

A subscription to joint stock is not only an undertaking with the company but with all other subscribers. So where one subscribed to the building of a railroad according to a specified survey, the amount to be paid only when the subscriptions reached an amount specified, he cannot be permitted to show that he was induced to subscribe by the promises of the company's agents that the road should be constructed not according to the survey, but past his house, etc., and that his subscription was not to be binding unless the road was so constructed.*

ASSUMPSIT on a subscription for stock. The opinion states the facts. The plaintiff had judgment below.

H. M. North and *E. D. North*, for plaintiff in error. Parol evidence is admissible to show that at the execution of a written contract, a stipulation has been entered into, a condition annexed, or a promise made by word of mouth upon the faith of which the writing has been executed, although such evidences vary and materially change the terms of the written contract. *Kostenbader v. Peters*, 30 P. F. Smith, 438; *Lippincott v. Whitman*, 2 Norris, 244; *Greenwald v. Kaster*, 5 id. 45.

*This was distinguished in *McCarty v. The Selinsgrove & North Branch R. R. Co.*, 87 Penn. St. 832, where it was held that "after the organization of the company a condition is binding; and ordinarily this is so, though it rest in parol only, where except for such condition the subscription would not have been made, and provided the rights of co-subscribers are not affected thereby. So, where previous to signing a subscription to stock in a corporation, the defendant objected to signing, for the reason that certain conditions, on which the subscription was to be made, did not appear therein, and was assured by the president of the corporation, that these conditions should be considered a part of the contract, parol evidence of these conditions is admissible in a suit on the subscription, and the non-performance of them is a defense." —[Rep.

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George Nauman and W. B. Given, for defendant in error.

GORDON, J. By the paper, which we have before us, it appears that the stock to which the defendant subscribed was designed for a special purpose, that is to say, for the "building and equipping of the extension of the Hanover Junction & Susquehanna Railroad, according to the survey made by the Philadelphia & Reading Railroad Company."

When, therefore, the defendant signed this paper, he was thoroughly informed of the intended route of the proposed road, and of the fact that his subscription, with the others made and to be made, was to be appropriated to the building of the branch designated, and to no other purpose. Again, the contract contained the further stipulation, that the money, thus subscribed, should be paid only when the subscriptions reached the sum of \$100,000. It also appears, from the paper itself, that these subscriptions were made by the "citizens of Marietta and its vicinity," which means, as we take it, by persons who were interested, not so much in the stock as an article marketable and valuable, as in the proposed improvement as something that would promote their individual welfare. We have, then, some ninety-nine or one hundred persons, of the indicated vicinage, agreeing together, under certain conditions, proposed to them by the railroad company, to join in the promotion of a common enterprise intended, mediately if not immediately, for their mutual benefit, and in effect, one says to another: for this purpose, here plainly set out in writing, I will give so much if you will give so much more, and so on until the requisite amount is made up.

Under these circumstances, on the trial of this case, the defendant offered to prove that the subscription-book was brought to him by three persons, who, as it appears from his evidence, were officers of the company, and who induced him to subscribe by representing that the road should be built, not as stated in that book, but past the defendant's house and up the east side of the river, and further, that he would not be obliged to pay until the road was so built. The court below overruled this offer; and what we have now to consider is whether this ruling was right or wrong. Were we to view the matter from the stand-point of the company's interest alone, we might pronounce against the conclusion adopted by the court. For that this company was in a position to make a binding conditional

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contract is conclusively settled by the case of this *Hanover J. & S. R. Co. v. Haldeman*, 1 Norris, 36. So, that a corporation must consent to abide by the contracts of its agents if it would profit by them, is in like manner ruled in *Caley v. The Railroad Co.*, 30 P. F. Smith, 363. So, it matters not whether the condition were in writing or parol, or if parol, that it contradicted the writing, if but for such condition the defendant would not have subscribed. So late as the case of *Lippincott v. Whitman*, 2 Norris, 244, this court held (per PAXSON, J.), that wherever equity would reform or set aside a written instrument, on the ground of fraud, or accident or mistake, parol evidence is admissible to contradict or deny the terms thereof. Now, as this doctrine has been iterated and reiterated, in every variety of phrase, and in almost every volume of our reports from 1 Binney to the present time, it may be taken as tolerably well settled. The reason of this rule is found in the desire of our courts to reach justice, however much the way thereto may be obstructed by mere technicalities. If one exhibits a written contract with his neighbor and it turns out, for any reason, that it does not contain the terms of the agreement, but rather the contrary, and if through the interposition of some arbitrary rule, the truth of the matter cannot be shown, it is clear that injustice has been done, a result not tolerable in a well-arranged judicial system.

But while this is so, we must take heed that the rule is not used as a means of fraud or wrong-doing. If however, we permit the defendant to make that use of this rule which he desires, the deprecated result must follow. Had he expressed in writing, on the subscription-book, the condition proposed to be proved, it would have been fair notice, to his fellow-subscribers, that his subscription amounted to nothing; was in fact a mere sham, since the condition, opposed, as it was, not only to the expressed action of the company but to the condition involved in every other subscription, could not possibly be enforced. Now, as we have already shown this subscription was specially designed to carry out a common adventure, in which the company was but a means used for its accomplishment, and the interests of which were but secondary; hence it follows, that if Miller succeeded in avoiding his obligation, he does so at the expense of his co-subscribers and in fraud of their rights. Every one who signed after him did so on the faith of his signature, as he did upon the faith of the signatures of those who preceded him, and to permit him now to set up a secret parol

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arrangement, by which he may be released whilst his fellows continue to be bound, would be any thing but just. As was said in the case of *Graff v. The Railroad Co.*, 7 Casey, 489 (per WOODWARD, J.), "a subscription to a joint stock is not only an undertaking to the company, but with all other subscribers. Such contracts are trilateral, and even if fraudulent as between two of the parties, they are to be enforced for the benefit of the third." This quotation expresses a principle applicable to the case in hand, and aptly illustrates the reason why the defendant should be estopped from setting up the secret parol agreement between himself and the agents of the company.

Judgment affirmed.

INSURANCE COMPANY OF NORTH AMERICA v COMMONWEALTH.

(87 Penn. St. 178.)

Constitutional law — taxation — of premiums received by insurance companies.

A State tax upon "the entire amount of premiums received by insurance companies," although it covers premiums drawn from sources outside the State, is not in conflict with the Federal Constitution.

DEBT to recover taxes. The opinion sufficiently states the case. The plaintiff had judgment below.

Morton P. Henry and *Richard C. McMurtrie*, for plaintiffs in error. The taxation here imposed is an interference with or a regulation of inter-State commerce and is within the prohibition of the Constitution of the United States. *Ohio & Mississippi Railroad v. Wheeler*, 1 Black, 286; *Marshall v. The Balt. & O. Railroad*, 16 How. 314; *Covington Drawbridge Co. v. Shepherd*, 20 id. 227. *Doyle v. Continental Ins. Co.*, 4 Otto, 535; *Insurance Co. v. Morse*, 20 Wall. 445; *State Tax on Railway Gross Receipts*, 15 Wall. 296; *Welton v. Missouri*, 1 Otto, 281; *Brown v. Maryland*, 13 Wheat. 419; *Inman Steamship Co. v. Tinker*, 4 Otto, 238; *Almy v. California*, 24 How. 169.

Lyman D. Gilbert, deputy attorney-general, and *George Lear*, attorney-general, for the Commonwealth.

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AGNEW, C. J. The question in this case is not doubtful, and were it so it would be our duty to resolve the doubt in favor of the State, lest she be deprived of redress in a higher court. • The doctrine of States rights in a sense which robs the Federal government of just rights should not be invoked; but States rights as found in the Constitution, forbidding the enumeration of Federal rights to deny others retained by the people, and declaring that the powers not delegated by the Constitution, nor prohibited by it to the States are reserved to them, respectively, or to the people, are justly the object of careful protection by both State and Federal courts. The States are the pillars of the Union. Their fall, if dragged down by Federal power, must involve both in ruin. It is therefore important that the boundaries of power be sacredly preserved. Yet these lines of demarcation are often faint and evanescent in some cases, but not so we think in this case.

The question here is whether the State can impose upon insurance companies, the creation of her own hands, a tax on all their business, as evidenced by the entire premiums brought into their treasury from all sources. That this is the scope and intent of the law we hold.

Is this an interference with any grant of Federal power, on the ground that a part of their receipts is drawn from sources outside of the State? We think not. That it is not a tax in the sense of "imposts or duties laid upon imports or exports" is plain. It is not laid on any property or article of commerce which can be imported or exported; but is simply a tax on money or its representative—on the results or avails of business—that which belongs to the corporation itself, and not the property of others. It is not a tax on property in another State, but on money which is in the treasury of a corporation within this State.

It is said it transgresses the power of Congress to "regulate commerce with foreign nations, and among the several States and with the Indian tribes." It is not a tax on anything coming in or going out of the State, or upon the means of transportation. It is not laid on any instrument of commerce, either representing or affecting commerce, as a bill of lading accompanying goods transported. It does not affect travellers coming in or going out, or property situate out of the State, in that it touches no interest outside of the State, except in that remote and incidental manner in which State taxation may affect all property entering into the com-

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merce of the State, and which has been frequently held by the Supreme Court of the United States to be no regulation of commerce conflicting with the Federal power. It is evident in the outset the case is not governed by the principles settled in such cases as *Brown v. Maryland*, 12 Wheat. 418; *Hays v. Steamship Co.*, 17 How. 596; *Steamship Co. v. Port-wardens*, 6 Wall. 31; *Passenger* cases, 7 How. 283; *Crandall v. Nevada*, 6 Wall. 36; *Almy v. California*, 24 How. 169; *Tonnage Tax* cases, 15 Wall. 232; *State Tax on Foreign Bonds*, id. 300. All these cases proceed on the ground that the constitutionality of a State tax law must be determined not upon the form or agency collecting the tax, but by the *subject* on which the burden is laid. *Tonnage Tax* cases, 15 Wall. 272; *Munn v. Illinois*, 4 Otto, 135. As said in *Doyle v. Continental Ins. Co.*, 4 Otto, 341: "In all cases where the legislation of a State has been declared void, such legislation has been based upon an act or a fact which was itself illegal." But the subject of this tax, as we have said, has no relation to any article of inter-State commerce, even in a remote and indirect way. The subject—money derived from the receipts of premiums—is not susceptible of regulation by any Federal law. In discussing this point we may first consider the person or party taxed—a corporation created by State law, located in the State and amenable only to its laws. It is not a citizen in the sense of the rights of persons secured by the Constitution, except for the purpose of Federal jurisdiction. *Ins. Co. v. French*, 18 How. 404; *Paul v. Virginia*, 8 Wall. 178; *Ducat v. Chicago*, 10 id. 415; *Liverpool Ins. Co. v. Mass.*, id. 573; *Railroad Co. v. Harris*, 12 id. 81. Nor can it exercise its powers outside of the State, except by the consent of the State into which it comes. *Bank of Augusta v. Earle*, 13 Pet. 519; *Paul v. Virginia*, 8 Wall. 180, 181; *Ducat v. Chicago*, 10 id. 410; *Ins. Co. v. Morse*, 20 id. 456; *Doyle v. Ins. Co.*, 4 Otto, 540. But it derives its faculties from our law; and its power to go out of this State, in pursuit of business permitted elsewhere, it obtains from this State alone. This faculty of action or power to go elsewhere is a home franchise, and is not conferred by the law of another State, by whose permission it *exercises* the franchise within it. It is this franchise—the power to make money by its business at home and abroad—which this State assumes to control as of right, and the burden imposed is the price it must pay for the faculty and powers conferred. By the exercise of this franchise it collects the fruits

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of its business, no matter where it is performed. The money which finds its way into its treasury is the product of these powers conferred by this State. In view of the corporate being thus conferred, the powers thus derived and the products of business thus gathered, the State necessarily possesses the power to tax the products of its corporate business, for none of them possess in the slightest degree an outside character or interest.

This brings us to consider more specially the subject of the tax. As already stated, a tax on gross premiums of insurance is a tax upon the receipts of money, or its representative in notes and bills, and not on property, or any article of commerce; it touches only a fund in the treasury of the company. As was said in the *Gross Receipts* cases, 15 Wall. 294, "the tax is laid on the gross receipts of the company; and upon a fund which has become the property of the company, mingled with its other property, and possibly expended in improvements, or put out at interest." See, also, *Erie Railroad Co. v. Pennsylvania*, 21 Wall. 497.* This tax is not measured by the subjects of insurance, for be the rates high or low, they do not govern, but the money only after it has passed into the hands of the company. The difference between this tax and that in the *Gross Receipt* cases is marked. There the receipts were the results of transportation, more nearly approximating a regulation of commerce, and the dissent of the three judges was put upon this ground. But here the tax is on the mere results of business, involving only local transactions, and partaking of no relation to inter-State commerce.

A contract of insurance is merely a guaranty against a loss of property by fire or marine disaster. When on chattels on land or sea, it is a protection merely given to the property, for which a price is paid. This price, or premium, is but a consideration, and the right to receive it rests on the faculty imparted by the State in its charter. Why shall not the State law tax the product of this faculty? It is no burden on those living outside more than those within the State. The tax on a franchise is admitted to be lawful. *Tonnage Tax* cases, 15 Wall. 277; *Tax on Gross Receipts*, id. 294; *Saving Society v. Coite*, 6 id. 606; *Osborn v. Bank U. S.*, 9 Wheat. 869; *Brown v. Maryland*, 12 id. 444; *Erie Railway v. Pennsylvania*, 21 Wall. 497. So the greater the scope of the business of an

* Reversing same case, 62 Penn. St. 286; S. C., 1 Am. Rep. 399.

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insurance company, the less must be the charge, and hence the spread of its risks into other States cheapens the price.

That a policy is a mere contract of indemnity against loss of property, and not an instrument of commerce, is held in several cases. *Paul v. Virginia*, 8 id. 183; *Ducat v. Chicago*, 10 id. 410; *Liverpool Insurance Co. v. Mass.*, id. 573. In the first case, Justice FIELD uses this language: "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market, as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not inter-State transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are then local transactions and are governed by the local law."

This clearly indicates the nature of the subject. Among the decided cases, we find many much nearer to the border line than this, yet where the legislation of the State has been upheld. Thus a tax on brokers who dealt entirely in the purchase and sale of foreign bills of exchange. *Nathan v. Louisiana*, 8 How. 73. So a tax on deposits in a savings bank invested largely in bonds of the United States, exempt from taxation. *Society for Savings v. Coits*, 6 Wall. 594; *Provident Institution v. Mass.*, id. 612. A tax on shares of stock in a railroad running through several States, in proportion to the length of the road in the State. *Delaware Railroad Tax*, 18 Wall. 206, 229; and on its income, id. 231. And a tax on warehouses used as the means of inter-State commerce. *Mumm v. Illinois*, 4 Otto, 114. Also, a tax on the person for shares of stock in corporations in other States. *McKeen v. Northampton County*, 13 Wright, 519, recognized in *State Tax on Foreign Bonds*, 15 Wall. 325.

Without further elaboration, we are of opinion the tax in this case on the entire premiums of the company is not illegal, or contrary to any provision in the Constitution of the United States.

Judgment affirmed.

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(87 Penn. St. 243.)

Attorney and client — right to release client's judgment.

An attorney at law has no right to release his client's judgment without his knowledge or consent. (*See note, p. 358.*)

A PPEAL from decree of distribution of fund arising from sheriff's sale of real estate. The opinion states the case.

H. M. Baldridge, for appellant.

Samuel S. Blair, for appellee.

MERCUR, J. This contention arises on the distribution of a fund produced by a sheriff's sale of real estate. The rights of the claimants depend on the effect to be given to a release executed by E. Hammond, of the lien of the judgment on which the appellants claim the money. The judgment was recovered by McNeal. In the assignment thereof, which he made to Hammond, he declared it was "to be held by Hammond as collateral security for the payment of the claim of Boggs & Kirk, for which claim I have this day given to the said Boggs & Kirk three promissory notes." This assignment was filed of record. The prothonotary entered on the docket the substance of the assignment, and added: "see paper filed." Hammond was an attorney at law. As attorney for Boggs & Kirk he took the notes of McNeal for a debt due them, and accepted the assignment. He therefore held it for their benefit. The assignment showed this fact. As between him and them he had no more right to release the lien of the judgment on lands bound thereby, than he had to give up the notes to the maker without payment.

In conducting a suit, an attorney at law has large powers. After judgment recovered, he may execute a valid receipt on its payment. Yet he cannot sell and assign it without the ratification of his client. *Campbell's Appeal*, 5 Casey, 401. Nor can he accept land in satisfaction of a debt of his client. *Huston v. Mitchell*, 14 S. & R. 307; *Stackhouse et al. v. O'Hara*, 2 Harr. 88; *Stokely v. Robinson*, 10 Casey, 315. His authority is limited to the discharge of

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that professional action which lies at the foundation of the relation of counsel and client. He has large discretionary power as to the manner and time of prosecuting his client's claim to judgment. He may order and direct the sheriff in regard to the collection of the execution. These powers are given to him to protect the rights and advance the interests of his client. He has no right to release property bound by his client's judgment. This appears to have been conceded by the learned judge if the record had showed Hammond held the assignment as attorney for Boggs & Kirk. It is true the record did not distinctly show that fact; yet we think it showed enough to have put the appellee on inquiry, and if so, inquiry thereupon became a duty. The exercise of common prudence and ordinary diligence, which he was bound to use, would have disclosed to him that Hammond held the assignment as attorney or counsel for Boggs & Kirk. *Lodge v. Simonton*, 2 P. & W. 439; *Creason v. Miller*, 2 Watts, 272; *Jaques v. Weeks*, 7 id. 261; *Walsh v. Stille*, 2 Pars. 17; *Hill v. Epley*, 7 Casey, 331. The release itself cannot be found, but the record entry recites "for value received. E. Hammond, Esq., releases from the lien of this judgment the real estate of Peter S. McCormick, but does not satisfy the judgment or any part thereof; see paper filed." Thus the record not only shows the assignment to be for the benefit of Boggs & Kirk, but also that Hammond executed the release without any payment on the judgment. A release, by one who held the legal title only, which proclaimed no payment on the judgment, and presumptively no consideration to the use party, should have put the appellee on inquiry. The language of the record gave sufficient notice of an implied breach of trust to make inquiry a duty. Failing to inquire, he must be affected by the facts which a due investigation would have disclosed. Those facts show Hammond was the attorney of Boggs & Kirk; that this release was a fraud on them; that it was made without their knowledge, and never ratified by them. The learned judge therefore erred in holding that the release, thus executed, discharged the lien.

Decree reversed, and record remitted, with instructions to decree distribution conformably with this opinion. It is further ordered that the appellee pay the costs of this appeal.

Judgment reversed.

NOTE BY THE REPORTER. — We note two very recent and interesting decisions on the authority of an attorney at law to bind his client. In *Levy v. Brannon*, 56 Miss 83, it was

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held that in the United States the weight of authority is against the English rule of law, that an attorney is the general agent of his client in all matters that may arise in the progress of the cause or the collection of the claim intrusted to him, and that he may compromise by accepting less than the full sum due, or, where the demand is for goods sold, by receiving back the goods in satisfaction; and the rule has been frequently repudiated by this court; but that an attorney has unlimited authority in conducting the litigation of his client's case; and where a claim has been intrusted to him for collection he may take all steps necessary to insure its collection, and has the power to control all legal process, and to compromise or release all attachments or other liens which have accrued in the progress of the litigation and do not belong to the original demand. The court say:

"In England it is broadly laid down that the attorney is the general agent of his clients in all matters that may be deemed likely to arise in the progress of the cause or the collection of the claim, and hence it is held that he may compromise by accepting less than the full sum due; or, where the demand is for the price of goods sold, by receiving back the goods in satisfaction. If he acts without the instructions of his client, he will not be liable to him if his acts have been *bona fide* and marked with reasonable care and skill. If he acts in violation of express instructions, he will be liable to his client, but the latter will be bound by his action, so far as the opposite party is concerned, unless that party was cognizant of the violated instructions. *Chown v. Parrott*, 14 C. B. (N. S.) 74; *Fray v. Voulez*, 1 El. & El. 839; *Protrich v. Puley*, 18 C. B. (N. S.) 806; *Strauss v. Francis*, L. R., 1 Q. B. 379.

"In the elaborate note to Story on Agency, section 24, and also in Wharton on Agency, section 592, it is said that the American rule is the same as the English. If these learned authors mean to say that a majority of the American courts recognize an inherent right in the attorney to compromise the original demand placed in his hand, so as to receive in full satisfaction less than the amount due, or to substitute claims upon other parties, or to take property in satisfaction of a money demand, or to release any security existing when he received the claim, we cannot agree with them. That there are cases going to this extent is true, but we think that the decided weight of authority in this country is the other way. Unquestionably such a rule has been repeatedly repudiated by this court. *Holker v. Parker*, 7 Cr. 436; *Albe v. Rood*, 6 McLean, 106; *Derwort v. Loomer*, 21 Conn. 245; *Nolan v. Jackson*, 16 Ill. 272; *Drub v. Barnes*, 1 Md. Ch. 127; *Langdon v. Potter*, 18 Mass. 330; *Davidson v. Rozier*, 23 Mo. 387; *Filby v. Miller*, 25 Penn. St. 264; *Vail v. Jackson*, 15 Vt. 314; *Lockhart v. Wyatt*, 10 Ala. 231; *Jones v. Ransom*, 8 Ind. 327; *Stuck v. Reese*, 15 Iowa, 122; *Succession of Weigel*, 18 La. Ann. 49; *Maddux v. Bevan*, 39 Md. 485; *Smith's Heirs v. Dixon et al.*, 3 Metc. (Ky.) 438.

"It is quite generally held, however, even by those courts which deny to the attorney the right to compromise a claim placed in his hand, that he has full control over the litigation necessary to insure its collection, and in the conduct and progress of it may take such action as he deems proper. The reason for the distinction is obvious; the owner of the claim must always be the proper judge of its value and of the terms upon which he is willing to extinguish it, or to release any of the securities by which it was protected when he placed it in the hands of the attorney; and the latter, therefore, must consult him before taking any step which is likely to produce these results. But the client cannot know as well as his lawyer the steps necessary to insure its collection, or estimate so accurately the value of the legal securities which may be evolved in the course of the litigation. It is because of his ignorance of these matters that he employs an attorney, and submits to his superior judgment the conduct of the litigation.

"To impose upon the attorney the necessity of consulting with his client whenever propositions are made to him with regard to these matters, which in his judgment are advantageous, would so embarrass and thwart him as in a great measure to destroy his usefulness: hence it is that the courts quite generally concede to the attorney unlimited authority over the conduct of the litigation, including the power to control all the legal process, and to compromise or release all attachment or other liens which have accrued in the progress of the cause, as collateral thereto and not belonging to the original demand. *Commissioners v. Younger*, 29 Cal. 147; *Phillips v. Rounds*, 33 Me. 357; *Gaillard v. Smart*, 6 Cow. 365; *Ford v. Williams*, 13 N. Y. 577; *Pierce v. Strickland*, 2 Story, 292; *Monson v. Hawley*, 30 Conn. 51; *Moulton v. Bowker*, 115 Mass. 36; s. c., 15 Am. Rep. 72. *Gordon v. Conlidge*, 1 Sumn. 587; *Jenney v. Delordernier*, 20 Me. 183. Some of the cases cited

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extend to the attorney a wider latitude than could be sanctioned in this State, where, by a series of adjudications, his authority has been confined within narrower limits. Thus it has been held that he cannot release a levy on personalty (*Banks v. Evans*, 10 Smed. & M. 35), nor grant a stay of execution (*Reynolds v. Ingersoll*, 11 id. 249), nor assign a judgment to a stranger who has paid to him the amount due on it (Walk. 431; we do not commit ourselves to an indorsement of this decision to its full extent), nor compromise in any manner the claim placed in his hands (*Fitch v. Scott*, 4 Miss. 314), nor receive any thing save lawful money in satisfaction of it. *Garvin v. Lowry*, 7 Smed. & M. 24. All of these decisions relate to the dealings of the attorney with the original claim placed in his hands, and the liens which by operation of law follow upon its reduction to judgment. They are believed to announce a rule more stringent than that which prevails elsewhere, in so far as they deny authority to release levies and stay executions."

The act of the attorney in the foregoing case was the following: His client had obtained judgment, execution was returned *nulla bona*, and he had got judgment against garnishees. The garnishees obtained an injunction, on a ground which if established would have nullified the judgment. Pending the injunction suit, the attorney accepted a certain sum of money from one of the sureties on the injunction bond, in consideration of the discharge of the bond and the dismissal of the injunction bill. The client was ignorant of this transaction, but it was upheld.

In *McGinnis v. Curry*, 13 W. Va. 29, it was held that an attorney at law, as such, has no authority before or after the institution of a suit to make an agreement *in pais* to submit his client's cause to arbitrators, though he may, if his clients are adults, consent in open court to submit their cause to arbitration; and if they be adults they will be thereby bound. The court said:

"The authority of an attorney at common law, by a consent order made in the court, to submit a pending suit to arbitration is universally admitted. And the court, in cases where such a consent order has been made at the instance of counsel, have frequently spoken of the authority of counsel to submit a controversy of his client to arbitration in general language, which would be broad enough to include not only a case of a submission of a controversy in a pending suit by an agreement of counsel *in pais*, but even a controversy about which no suit was pending. But all the cases in which such loose and general language was used were cases where the authority of the counsel was exercised not only in a pending suit, but by a consent order agreeing to the submission made in open court. See *Wilson v. Young*, 9 Penn. St. 101; *Holker v. Parker*, 7 Cr. 449; *Somers v. Balabrega*, 1 Dall. 154; *Bingham's Trustees v. Guthrie*, 19 Penn. St. 418.

"In England, though, so far as I know, it has never been decided that an attorney had a right to submit his client's controversy to arbitration when no suit was pending, or by an agreement *in pais*, and not by order in court, when a suit was pending, yet there are English cases from which it may be inferred that the courts may there consider the power of the attorney to submit his client's cause to arbitration in general, and not confined to pending suits, or to orders of reference made in court. See *Banfil v. Leigh & Jeffray*, 8 T. R. 571; *Jamison v. Binns & Dean*, 4 Ad. & E. 945 (21 Eng. C. L. 231). But in considering how much weight should be attached to these dicta of English judges, it should be remembered that an attorney in England occupies toward his client a very different relation from what he does in this country. There he is very frequently the general agent of the client, and transacts a great deal of his general business. But here an attorney is generally employed to attend to his client's interest in reference to some single controversy.

"In Pennsylvania, too, there are decisions which might seem to imply that the power of an attorney to submit to arbitration was not confined to the making of a consent order in a pending cause to refer it to arbitration. See *Bingham's Trustees v. Guthrie*, 19 Penn. St. 418. But in considering what weight should be attached to the dicta of Pennsylvania judges, it should also be borne in mind that in Pennsylvania the authority of attorneys is more extensive than elsewhere. See *Commonwealth v. Lynch*, 16 S. & R. 308; *Wilson v. Young*, 9 Penn. St. 101.

"While I have found no case deciding that an attorney has a general authority to submit his client's controversies to arbitration, there are cases in which it has been decided that he does not possess such general authority. See *Jenkins et al. v. Gillespie*, 10 Sm. & M. 31; *Scarborough v. Reynolds*, 12 Ala. 252.

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"It is true that these were cases in which there was no *lis pendens*. But it seems to me that as it is held that an attorney, by reason of his being employed to institute a suit or defend a threatened suit, has no authority to submit, by an agreement *in pais* signed by the attorney, the case to arbitration, that it must follow that he has no such authority, though the suit be pending. An authority to act *in pais* could only be inferred, if it exist, from his employment before the institution of the suit as an attorney, and such employment we have seen confers no such authority.

"This conclusion is not at all inconsistent with the numerous causes deciding that an attorney has authority in a pending suit by an order of court to submit the cause to arbitration. When the courts have assigned any reason for their decisions, they have been based not merely, if at all, on the employment of the counsel by the client, but on the fact that he is an officer of the court acting in the presence and under the control of the court, and as such has a right to take any legal steps he may deem proper in prosecuting or defending the suit. Thus, at the trial of the case he may admit facts, and his client is bound by such admission; he may confess a judgment in court which will bind the client; he may demur to the evidence, and thus prevent a jury from acting on the case, and he may do many other acts in court by which his client may be prejudiced, but by which he is nevertheless bound. And why, it is asked, may he not in court consent to an order submitting the case to arbitrators, this being one of the legal modes of prosecuting or defending a suit? See *Talbot v. McGee et al.*, 4 Mon. 377; *Wade v. Powell*, 31 Geo. 1; *Buckland v. Conway*, 16 Mass. 396; *Smith v. Bosard*, 2 McCord's Ch. 408.

"But this reasoning has no application to any action of the attorney *in pais*, such as agreeing to submit the case to arbitrators by an agreement signed by him without any special authority from his client. Such an act on his part is in principle undistinguishable from a similar act done by him before the institution of the suit. And I, therefore conclude he has no authority to so act."

CHESS'S APPEAL.

(37 Penn. St. 302.)

Will — legacy — when vested.

A testator devised real estate to his son, providing that if the son should die without legitimate issue, the land should be sold, and the proceeds should be equally divided among his grandchildren, born or to be born. Some of the grandchildren having died before the son, *held*, that their representatives were entitled to take their shares on the distribution.

APPEAL from a probate court decree of distribution. The opinion sufficiently states the case.

R. B. Carnahan, for appellant. Where there is no gift but by a direction to pay or divide and pay at a future time or on a given event, or to transfer "from and after" a given event, the vesting will be postponed till after that time has arrived or that event has happened, unless from practical circumstances a contrary inten-

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tion is to be collected. *Leake v. Robinson*, 2 Meriv. 387; *Booth v. Booth*, 4 Ves. 399; *Moore v. Smith*, 9 Watts, 403; *Donner's Appeal*, 2 W. & S. 372; *Seibert's Appeal*, 1 Har. 501; *Bowman's Appeal*, 10 Casey, 19; *Lamb v. Lamb*, 8 Watts, 185; *McClure's Appeal*, 22 P. F. Smith, 417.

John G. Bryant and John D. Shafer, for appellee.

SHARSWOOD, J. Moses Middleswarth by his last will devised certain real estate to his son Jonathan, directing that in case his said son should die without leaving any legitimate issue, the land should be sold, and after paying certain legacies, the balance remaining to be equally divided among all his legitimate grandchildren, born or to be born, share and share alike. The question which is presented for decision upon this appeal is whether the interest thus given to his grandchildren was transmissible to their representatives on their death before the period when the division was to take place.

No doubt it is the general rule that a legacy is to be deemed vested or contingent just as the time when it is to take effect shall appear to be annexed to the gift or the payment of it. Where there is no substantive gift, and it is only implied from the direction to pay, the legacy is contingent. But this rule is, of course, subject to the necessary exception that a contrary intention is not to be collected from the words or circumstances. In *McClure's Appeal*, 22 P. F. Smith, 414, our late lamented brother WILLIAMS, in an elaborate and exhaustive opinion, has shown that there are many cases in which this general rule is not applicable.

In *Chew's Appeal*, 1 Wright, 23, it was said by Mr. Justice STRONG, that "generally a bequest after the death of a particular person to whom an antecedent interest is given in the same will, is held not to denote a condition that the legatee shall survive such a person—not to define when the interest shall vest, but only to mark the time when the gift shall take effect in possession, that possession being deferred merely on account of the life-interest limited to the person on whose death the gift is to take effect." So in *McClure's Appeal*, Mr. Justice WILLIAMS said: "Though there be no other gift than in the direction to pay or distribute *in futuro*, yet if such gift or distribution appears to be postponed for the convenience of the fund or property, or where the

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gift is only postponed to let in some other interest, the vesting will not be deferred till the period in question." Thus, in the common case of a legacy or gift to A, and on his death to B, no one doubts that both interests, the present and the future, vest together at the same instant. Attaching a contingency to the gift of the second bequest ought not and does not affect the case unless that contingency relates to the capacity of the second legatee or donee to take. In a legacy to A, and if he dies before attaining the age of twenty-one, then to B, the interest of B, though dependent upon a contingency, is transmissible. It would be different if the gift over was to B, at twenty-one, for if he should die before attaining that age, he could never take, and could therefore have nothing to transmit. It was in accordance with these principles that the case of *Kelso v. Dickey*, 7 W. & S. 279, was decided. There a testatrix bequeathed a legacy to her daughter under the following contingency: "In case she dies before the age of twenty-five, or without issue born, then to be divided equally between my sister and brothers." The daughter died without issue before she arrived at twenty-five. It was held that the legacy was so vested in the sister and brothers of the testatrix as to be transmissible to their personal representatives in the event of their death before the daughter of the testatrix. Mr. Justice SERGEANT said: "The contingency on which the legatees over were to take was not a contingency annexed to their capacity to take; such, for example, as their living to a certain time; but an event independent of them and not affecting their capacity to take or transmit the right to their representatives, and such a contingent interest has frequently been decided to be vested so as to be transmissible to representatives." To the same effect is *Hopkins v. Jones*, 2 Barr. 69. These cases are in point, and rule that which is before us.

Had the devise been to Jonathan and on his death then to be divided among the grandchildren, no one could question the transmissibility of their interest. That they were to take only in case he died without legitimate issue, though it made their interest dependent upon a contingency, did not change its character in this respect, because it was not a contingency which affected at all their capacity to take. Whenever the contingency happened, if ever it did happen, they would be entitled. The inclination of the courts is always in favor of the vesting of legacies, because in ninety-nine cases out of a hundred it is the intention of the testator that his

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bounty should be transmitted to the children or family of the beneficiary, otherwise indeed full effect is not given to it.

Decree affirmed and appeal dismissed at the costs of the appellants.

Decree affirmed.

KING v. THOMPSON.

(87 Penn. St. 365.)

Nuisance — unfenced opening in sidewalk — contributory.

The plaintiffs in walking along a sidewalk in the evening stepped into an opening in front of a cellar window, and was injured. The opening was about fifteen inches wide and three feet long, designed for light and ventilation, and of a usual character. The street was lighted and there was a light in the window over the opening. *Held*, that the opening was not in itself a nuisance, and that there was evidence of contributory negligence for the jury.*

ACTION for damages for personal injury. The opinion states the case. The plaintiffs had judgment.

A. M. Brown, for plaintiff in error.

George W. Guthrie, for defendants in error. Whether this opening was lawful was a question for the jury. *Shearm. and Redf. on Neg.*, § 383 ; *Dillon on Mun. Corp.*, § 794 ; *Stewart v. Alcorn*, 2 W. N. C. 401. A similar nuisance maintained by others does not make this one lawful. *Appeal of the City of Philadelphia*, 28 P. F. Smith, 39.

PAXSON, J. This was an action on the case brought by the defendants in error, John Thompson and Elizabeth, his wife, in right of said Elizabeth, to recover damages for alleged injuries to the wife, caused by her falling into a cellar window opening of a building on Liberty street, Allegheny city. The plaintiff in error, Robert H. King, was the owner of the premises where the accident occurred. There was an opening in the sidewalk at the cellar window of the house, for the purpose of light and ventilation, which

* See note, 28 Am. Rep. 502.

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was used for taking in coal. This opening was about fifteen inches in width and less than three feet in length, thus projecting into the pavement from the front wall of the house fifteen or sixteen inches. The opening appeared to have been of the usual character for like buildings in the city.

[Omitting minor points.]

The fifth specification alleges that the court erred in not instructing the jury as requested in the defendant's second point, which was as follows : "If the jury find that the area in front of the cellar window was such as was usual and customary in the city of Allegheny for lighting and ventilating cellars, and reasonably necessary for those purposes, then the defendant is not guilty of negligence or nuisance in maintaining it." This point ought to have been affirmed. If the opening was merely the usual and customary opening of cellar windows in Allegheny, and was reasonably necessary for the purposes of light and ventilation, it certainly could not be held to be a nuisance ; nor could it fairly be said that the owner was guilty of negligence in maintaining it. We must take a reasonable view of this question. If it has been customary time out of mind for property-holders in Allegheny to have such openings, it involves a tacit assent on the part of the municipal authorities, as well as a general acquiescence on the part of the public. More than this, if such openings exist at nearly every house, such fact must have been known to this plaintiff as well as others. And if reasonably necessary for light and ventilation, the property-owner is not chargeable with negligence for placing and keeping it there. The jury might have found against the custom, and that the opening was not necessary for the purposes indicated. But the question should have been submitted to them, and it was error not to affirm the point.

The defendant's fourth point called upon the court to instruct the jury that, "If the sidewalk was ten feet wide, and there was a paved space seven or eight feet wide between the curb and trees on one side, and the cellar window opening or area on the other side, whereon persons using the sidewalk could pass with ease and safety, and that the way was lighted by a lamp in the window immediately at the opening, and by gas lamps in the street, sufficient to enable the plaintiff to have avoided the accident of which she complains, then she was guilty of negligence, and cannot recover." The court having refused to charge as thus requested, we must

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assume the jury would have found the facts as stated in the point. It has been held in a number of cases, the most recent of which is *Hoag v. The Lake Shore & Michigan Southern Railroad Co.*, 4 Norris, 293, that where the facts are ascertained the court may pass upon the question of negligence as a matter of law. What are the facts here? A sidewalk ten feet wide; a paved space from seven to eight feet wide between the curb and trees on the one side and the opening at the cellar window on the other; the street lighted by a lamp in the window, and gas lamps in the street sufficient to have enabled the plaintiff to avoid the accident. It is really difficult to see how the plaintiff succeeded in getting into the hole. The testimony does not enlighten us. It must be borne in mind that the opening came out only about sixteen inches from the cellar wall. In order to fall in the plaintiff must have walked so close to the house as to touch it with her dress. She was also within the line of the door-steps, which usually project twice the distance into the sidewalk that the opening did. No prudent person walks within sixteen inches of the houses when passing over the sidewalks of a city. It cannot be done without peril. Even where a street is dimly lighted the line of the houses is always visible. It is proper enough to hold owners of property to a reasonable care over it; yet, at the same time, persons using public streets ought also to exercise some little caution. Without it, there is hardly a street in Allegheny or Pittsburgh where, by reason of some slight inequality in the pavement, a trifling hole, or a loose stone, the passer-by may not fall and sustain injury. The defendant's fourth point ought to have been affirmed without qualification.

The judgment is reversed, and a *venire facias de novo* awarded.

Judgment reversed.

GORDON and TRUNKEY, JJ. Believing the fourth point was well refused, we dissent from so much of this opinion as reverses the court on that point.

Barr v. Moore.

BARR V. MOORE.

(87 Penn. St. 385.)

Libel — charges against one as a politician — when actionable.

A newspaper article, concerning the chairman of a political county committee, not a candidate for office, described him as an impudent impostor; charged him with writing an address for money out of a corruption fund; alleged that he was the recognized champion and professional defender of prostitutes and the lowest criminals, and that he followed his profession solely to make money, and moulded his opinions according to his client's ability to pay. *Held libellous per se.*

ACTION for libel. The opinion states the facts. The plaintiff had judgment below.

Hampton & Dalzell, Wier & Gibson, S. Schoyer, Jr., L. C. Schoyer and A. K. McClure, for plaintiffs in error, cited *Commonwealth v. McClure*, 3 W. N. C. 58; *Commonwealth v. Taggart*, and *Commonwealth v. The World*, both unreported; *Chapman v. Calder*, 2 Harris, 365; *Kinyon v. Palmer*, 18 Iowa, 377; *Edwards v. Chandler*, 14 Mich. 475; *Detroit Daily Post v. McArthur*, 16 id. 447; *Kelly v. Sherlock*, L. R., 1 Q. B. 686; *Kelly v. Tinling*, id. 699.

T. M. Marshall and M. Swartzwelder, for defendant in error.

MERCUR, J. This was an action to recover damages for the publication by the plaintiffs in error of an alleged libellous article. It appeared in a daily newspaper, of which they were the editors and proprietors. The plea admits the publication, and without averring any fact therein charged to be true, substantially claims that inasmuch as the defendant in error was chairman of the county committee of the Democratic party, his acts in such capacity were a proper subject for investigation and information, and as their article was in answer to a certain publication made by him, the alleged libellous article was proper for publication, and therefore they had a right to publish it.

The first assignment of error is to the court having instructed the jury that the publication of the article charged in the declaration was libellous *per se*. Did the court err in so instructing?

A libel may be defined to be any malicious publication, written, printed or painted, which by words or signs tends to expose a person to contempt, ridicule, hatred or degradation of character. *Runkle v. Myer*, 3 Yeates, 518; 3 Am. Dec. 393; *McCorkle v. Binns*, 5 Binn. 340; 6 Am. Dec. 420; *Pittock v. O'Niell*, 13 P. F. Smith, 258; s. c., 3 Am. Rep. 544. In 1 Am. Lead. Cas., § 116, after citing many English and American cases, the learned authors say: "Upon a consideration of the various cases on the subject, we may conclude that any publication injurious to the social character of another, and not shown to be true, or to have been justifiably made, is actionable as a false and malicious libel."

Passing then to the publication complained of, we find it reads: "An impostor. — A man who resides in Allegheny city named W. D. Moore, and who subscribes himself as chairman of the Democratic county committee, appeared in yesterday's Sunday papers in a card addressed to the Democratic voters of this city of Pittsburgh, for the writing of which he was paid a fee by the ring, and the publication of which was paid for out of the corruption fund of the McCarthy-Mageo-Snodgrass ring, in which the impudent impostor attempts to dictate to the Democratic voters of this city. This man Moore is in the pay of the ring, and the fact does not surprise us in the least when we reflect that he has descended from the high calling of a clergyman to the recognized champion and professional defender of prostitutes and the lowest grade of criminals who throng the audience halls of our police and criminal courts; and he seems to follow his profession solely for the purpose of making money, and his opinions are moulded by the extent of his client's means to pay. The money of the ring, the money of the prostitute and the money of the libertine and burglar is all alike to him if he is duly intent on making money. Does this man Moore fancy that because he has bartered himself away that he has sold and transferred a single Democrat in fee simple to the ring robbers?"

It needs no labored argument to prove that this language tended to expose the defendant in error to contempt, hatred and degradation of character. He is thereby charged with corrupt and mercenary acts, as chairman of the county committee; with being the recognized champion of prostitutes and the lowest grades of criminals, and substantially that his professional opinions, as an attorney of the courts, are not given with integrity and good faith, but are moulded and prostituted according to the amount of money he

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receives therefor. It impliedly charges a wicked and corrupt disregard of his official oath to behave "with all good fidelity as well to the court as to the client." It also strikes at his integrity as a man and tends to degrade his social standing as a citizen. It would be difficult to charge a more disreputable course of conduct or to present a darker picture of professional character. The learned judge was clearly right in holding the publication of the article charged in the declaration to be libellous *per se*.

The defendant in error was not a candidate for any office. Conceding his action as chairman of the Democratic county committee to have been a proper subject for an organ of his party to investigate and to criticise with considerable freedom, yet that fact affords no legal justification for the fierce onslaught made upon him. It goes far beyond answering, refuting and denying every thing averred or intimated in the publication made by him. His publication proclaimed to the Democrats of the city of Pittsburgh that their candidate for controller was ineligible to that office under the city ordinance; and that at a late preceding election for the office of State treasurer he had actively and openly supported the opposition candidate, and opposed the nominee of his own party; and he notified the Democrats of Allegheny city that they had no Democratic candidate for mayor, nor was any man running, who was entitled by the usages of the party to call himself their representative. Although this publication may have been in bad taste or even unjustifiable toward his party and toward the one candidate nominated, and the other adopted and supported by it, yet it did not necessarily reflect on the moral character or integrity of either of them. If the answer of the plaintiffs in error had kept within the bounds of truth; if by their plea they had averred the truthfulness of the facts which they alleged, and sustained that plea by evidence, a different case would be presented. They put in no such plea. They gave no evidence to sustain their allegations, nor could they under the pleadings. Practically they admitted the charges made in their publication to be untrue. Although they were false in fact, yet it was urged that the article was so far a privileged communication as to protect the publishers thereof against this action. To support this position they invoke the aid of that part of article 1, section 7, of the Constitution of 1874, which declares "no conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or

men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made, shall be established to the satisfaction of the jury." In answer, we say this clause refers only to attempted "conviction" in a "prosecution," and in no wise applies to a civil action to recover damages. It would be a clear perversion of language to extend it to any case other than a "prosecution" in which a "conviction" is sought. It manifestly refers to the trial on an indictment for a libel.

The liberty of the press should at all times be justly guarded and protected; but so should the reputation of an individual against calumny. The right of each is too valuable to be encroached on by the other. Hence, another part of the section just cited declares "the free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty." Thus it appears this right or liberty is not one of unlimited license, but it is restrained by a legal responsibility.

The high esteem in which reputation is held, and the protecting care which the organic law has thrown around it, are clearly expressed in the first section of the Declaration of Rights. It declares "all men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." Thus reputation and property are put on the same high ground. The fundamental law affirms the same inherent and indefeasible right in all men to protect the one as fully as the other. This language in the Declaration of Rights naturally flows from the doctrine of the common law. The natural right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation. The security of his reputation or good name from the arts of detraction and slander are rights to which every man is entitled by reason and natural justice. The reason given is that without this "it is impossible to have the perfect enjoyment of any other advantage or right." 1 Blackst. Com. 134. The right to protect reputation being inherent in man and being indefeasible, it cannot be annulled by legislative action. A good reputation is too valuable to admit of its being falsely assailed without the law giving some

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redress to the person injured. The general liberty of the press must be construed in subordination to the right of any person calumniated thereby, to hold it responsible for an abuse of that liberty. It follows that the article published by the plaintiffs in error was not privileged, and having failed to establish its truthfulness, they are liable in damages.

Although malice is a necessary ingredient in slander and libel, yet it must be understood in its legal signification. In its common acceptation malice means ill-will against a person; but in its legal sense it means a wrongful act done intentionally, without just cause or excuse, and therefore every utterance or publication having the other qualities of slander or libel, if it be willful and unauthorized, is in law malicious. Legal malice alone is sufficient to support an action. If the words are actionable in themselves, as we have shown them to be in this case, and not being privileged, the publication of them is sufficient evidence of legal malice. 1 Am. Lead. Cas. 192. The falsity of the publication creates an implication of malice. *Farley v. Ranck*, 3 W. & S. 554.

We see nothing in the several assignments relating to damages, that calls for correction. The fact that an indictment may be sustained does not preclude the jury from giving vindictive damages. When the act is both a public and private wrong, the public and the person aggrieved, each has a distinct and concurrent remedy. *Foster v. Commonwealth*, 8 W. & S. 77. If the party aggrieved makes out a case which justly calls for vindictive damages, his right thereto cannot be defeated by the fact that the plaintiffs in error may be punished for an injury to the public. [But on an error in the admission of evidence,]

Judgment reversed, and venire facias de novo awarded.

PITTSBURGH, FORT WAYNE & CHICAGO RAILWAY, ETC., CO.
v. COLLINS.

(87 Penn. St. 405.)

Negligence — contributory — trespasser on railway track.

A person who, without right, with a full knowledge of the location, voluntarily places himself upon a railroad track, at a place where there is no cross-

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ing, and which is a known place of danger, and is killed by a passing train, is negligent, and no damages can be recovered for his death, except for wanton injury.*

ACTION for damages for negligent killing of plaintiff's husband and father. The opinion states the facts. The plaintiff had judgment below.

Hampton & Dalzell, for plaintiff in error.

A. M. Watson, for defendants in error, cited *Railroad v. Rowan*, 16 P. F. Smith, 393; *Railroad v. Weber*, 22 id. 27; *Weiss v. Railroad*, 29 id. 387; *Penn. Railroad v. Lewis*, id. 33; *Railroad Co. v. McElwee*, 17 id. 311; *Penn. Railroad Co. v. James*, 23 Pitts. L. J. 54.

PAXSON, J. On the evening of November 9th, 1876, James Collins was found dead on the tracks of the Pittsburgh, Fort Wayne & Chicago Railway Company, in the city of Allegheny. An engine and two cars had just passed when he was found, and it seems clear from the evidence that one or both of the cars, and possibly the engine, had passed over him and inflicted injuries of which he died the same evening. This suit was brought in the court below by the widow and minor children of the deceased to recover damages for his death, upon the ground that it was occasioned by the negligence of the railway company.

We are saved the discussion of the question as to how far negligence on the part of the company or its employees was established, by the fact, that conceding all that was claimed on behalf of the plaintiffs below in this respect, the deceased was clearly chargeable with contributory negligence. This will appear from a brief statement of the undisputed facts. He had lived for years in the immediate neighborhood of the spot where he was killed; was necessarily familiar with the track at that point, and must have known that it was a place of danger. There was no public crossing at or near the place where he was injured. The last time he was seen before the accident was about seven o'clock in the evening, passing along Wilkins street toward Preble avenue. The witness says he was under the influence of liquor. He was probably on his way home. Preble avenue is forty feet in width, and runs parallel with and by

*See *Penn. Co. v. Sinclair*, ante, p. 185.

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the side of the track for a short distance. There was a sidewalk on the side of Preble avenue furthest from the track, along which he might have walked in safety to the point where he would naturally turn to go home. This was a switch connecting his employer's mill with the railroad, and which ran across Preble avenue. Instead of turning off at the switch and going toward home he appears to have crossed the switch and continued on along the avenue, or else upon the railroad track, in a direction contrary to his home, to the spot where he was killed. It was undisputed that from that point the locomotive could be seen for a considerable distance; that it was running at a moderate rate of speed, with a bright head-light. There were three tracks. The track next the avenue was unballasted, and between that and the next track were large piles of cinders. The deceased was found lying on the track next to the avenue, which was a side track. In the immediate vicinity were piles of cinders of considerable size. The night was unusually dark. Notwithstanding this he could hardly have crossed the switch without knowing it, and being thus warned that he was deviating from his course. If, however, he had passed the switch, and had inadvertently or by reason of the darkness stepped upon the track, the ties and rails and piles of cinders must have instantly warned him of his danger. It is thus the case of a man who without right, with a full knowledge of the location, voluntarily places himself upon a railroad track, at a place where there is no crossing, and which was a known point of danger. He was a mere trespasser, and the case comes directly within the ruling in *The Railroad Co. v. Norton*, 12 Harr. 465, that "where a person places himself on the track of a railroad he can claim no damages, except for wanton injury, and not for injury sustained in the pursuit of the company's lawful business in the ordinary manner, even though the negligence of the company's agents contributed to the result." In *Mulherrin v. The Railroad Co.*, 31 P. F. Smith, 367, it was said: "Except at crossings where the public have a right of way, a man who steps his foot upon a railroad track does so at his peril. The company has not only a right of way, but such right is exclusive at all times and for all purposes." It may be the deceased was so far under the influence of liquor as not to know precisely where he was going. But the plaintiffs in error are not responsible for that. They did not furnish the liquor. If, as was strongly contended at bar on behalf of the defendants in error, the deceased was not affected by

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liquor at all, there was still less excuse for his being on the track. It was negligence *per se* to go there, knowing as he did the locality and its danger.

Much as we deplore the loss which this unfortunate family have sustained, the law compels us to say that it is one for which the plaintiffs in error are not responsible. This renders it unnecessary to discuss any of the other points raised by this record.

Judgment reversed.

GERMAN AMERICAN BANK V. AUTH.

(87 Penn. St. 419.)

Surety — on bond of bank messenger — breach for stealing moneys from safe — negligence of obligee.

The bond of a bank messenger bound him "to account for and pay over all moneys that may come into or pass through his hands as such messenger and that he shall in all things conduct himself honestly and faithfully as such messenger." The bank intrusted him with the keys of the vault and the combination of the safe. He stole moneys of the bank from the safe and vault by means of the keys and his knowledge of the combination. *Held* that the sureties on the bond were liable therefor.

DEBT on a bond. The opinion states the facts. The defendant had judgment below.

J. Ludewig Koethen and Slagle & Wiley, for plaintiff in error.

James P. Sterrett, J. M. Kennedy and J. C. Doty, for defendant in error. A surety cannot be held liable beyond the terms of his obligation. *Commonwealth v. Simonton*, 1 Watts, 310; *Building Association v. Benson*, 2 W. N. C. 541. Auth had the keys of the bank and the combination of the safe. He must have opened the bank, unlocked the vault and safe and taken the money at night. He was enabled to do this, because the bank allowed him to carry the keys and have the combination of the safe. By so doing, the bank assumed the risk itself. Auth's sureties are not answerable for the loss. In the absence of evidence it cannot be customary to accord to messengers such extraordinary privileges.

GORDON, J. John C. Auth, the principal in the bond in suit, was messenger for the German American Bank, and as such was,

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from time to time, trusted to handle the moneys of that institution. On the 28th day of May, 1875, according to the statement of Charles Seibert, the cashier, some three thousand and sixty-six dollars were placed in a tin box or till, used for such purpose, and as he thinks, delivered to Auth to be put in the safe. This was on Friday evening; the bank-vault and safe were not opened until the next Monday morning, but when opened, it was found that the above-mentioned sum of money was missing. In the meantime Auth had eloped. There is not much doubt, if the testimony is to be credited, but that he stole this money; certainly the evidence is sufficient to justify a jury in so finding, especially since, in addition to what has been above stated, it was in proof that he had in his possession duplicate keys of the bank and vault, and had also knowledge of the combination necessary to open the safe-lock. The court, however, on motion of the defendants, sureties of Auth, nonsuited the plaintiff, for the reasons following, viz.: because the evidence of the plaintiff showed that if the money was taken by John C. Auth at all, it was taken from the safe, and in consequence of his having the combination of the safe-lock, and not in his capacity as messenger; that there was no evidence "that it was within the scope of the duties of a messenger to have the combination of the safe and access thereto."

From this action of the court we feel obliged to dissent, and as a reason for so doing, it might be sufficient to call attention to the fact, that whether Auth's duties as a messenger required that he should or should not be intrusted with the bank-keys, it certainly was his duty, as a bank employee, to act honestly. Granting, therefore, that the cashier acted negligently in committing to him the combination, he did not the less violate his duty in stealing the money of the bank.

It is not necessary, however, to look beyond the face of the bond itself, in order to discover the incorrectness of the court's ruling. The bond recites that it shall be the duty of John C. Auth to account for and pay over all moneys "that may come into or pass through his hands as such messenger, and that he shall in all things conduct himself honestly and faithfully as such messenger." Here are two things made obvious: (1) he is to be intrusted with the funds of the bank; (2) he is to be honest and faithful in the execution of the trust thus confided to him: Thus it is, that without a discussion of the peculiar duties of a messenger, as defined by

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dictionaries, the bond itself clearly indicates what the duties of John C. Auth were, and how those duties were to be performed. And if now John C. Auth did act honestly and faithfully with reference to the funds of this bank, which passed through his hands, then is the thief an honest man, and then also is it true that the condition of the bond remains unbroken.

But what, after all, was the great impropriety of intrusting to Auth the combination of the safe-lock? It must needs, in order to avoid accident, be committed to some one or more persons, and who more proper than one who had the handling of the bank funds, and who was held in a heavy bond to act honestly? Besides, if he was to be intrusted with the moneys of the bank, why not with the place in which those moneys were to be kept?

Be this, however, as it may, the whole matter is summed up in this: Auth availed himself of his position in the bank to rob it, and but for that position he could not have accomplished his purpose. The loss to the plaintiff resulted from the abuse of powers which he, Auth, had acquired as its messenger; and so, whether he got at this money by fraud and craft, by picking or breaking the locks, or through the confidence placed in him by the cashier, is of no moment, since, in either case, he violated his duty as a subordinate officer or servant; he was not an honest and faithful messenger, and therefore the condition of his bond was broken.

The judgment is reversed, and a *venire facias de novo* is awarded.

Judgment reversed.

 HOWE SEWING MACHINE CO. v. SLOAN.

(87 Penn. St. 433.)

Distress for rent — goods held by tenant for sale on commission.

Goods held by an agent for sale on commission are not liable to distress for rent due from the agent.*

REPLEVIN for sewing machines consigned by plaintiff to McKinley for sale on commission, and distrained upon by the defendant for rent due from McKinley. The defendant had judgment below.

* To the same effect *McCreery v. Claffin* (87 Md. 436), 11 Am. Rep. 543.

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Thomas Roddy, for plaintiff in error.

C. L. Baker and *C. O. Bowman*, for defendant in error.

SHARSWOOD, J. The rule of the common law that the goods of a stranger on demised premises are subject to the distress of the landlord has yielded, and must continue to give way to the growing necessities of trade and business. As Chief Justice GIBSON has said: "There is little reason to doubt that the exceptions will, in the end, eat out the rule." It is not a subject upon which it would be wise to draw refined distinctions. It was settled in *Brown v. Sims*, 17 S. & R. 138, that goods on storage were exempt, though the business of the tenant was not exclusively that of a warehouseman. Certainly a man may safely intrust his cattle to a farmer to agist, who raises his own beasts for the drove or the market. Nor is there any reason why a similar principle should not be applied to the case of goods intrusted to an agent to be sold on commission. It is notoriously the usage for merchants — not holding themselves out as commission merchants — to receive and sell goods in that way. In the particular case before us it would seem reasonable to infer that the products of sewing machine companies, the machines themselves being known by the name of the manufacturers, are usually sold by these agents on commission. There was enough to put the landlord on inquiry if notice was necessary. The broad principle which governs the case has been succinctly and happily expressed by our brother MERCUR, in *Karns v. McKinney*, 24 P. F. Smith, 390. "The principle," he says, "covering these cases during the tenancy, except when the goods are in the custody of the law, is this: Where the tenant, in the course of his business, is necessarily put in possession of the property of those with whom he deals or of those who employ him, such property, although on the demised premises, is not liable to distress for rent due thereon from the tenant."

The judgment entered on the decision of the referee is reversed, and the record is remitted to the Court of Common Pleas, that judgment may be there entered for the plaintiffs, and their damages for detention ascertained by a writ of inquiry.

Judgment reversed and record remitted.

First National Bank of Clarion v. Gruber.

FIRST NATIONAL BANK OF CLARION V. GRUBER.

(87 Penn. St. 468.)

Evidence — bank charter — judicial notice.

A bank is a private corporation, and its charter a private act, to be pleaded and proved like all other private acts, and the court will not take judicial notice of it without such proof.

DEBT to recover double usurious interest. See *Blatz v. Columbia National Bank*, *ante*, and note.

Wilson & Jenks, for plaintiff in error.

W. L. Corbett, for defendant in error.

SHARSWOOD, J. As the judgment in this case has been just reversed on the writ of error sued out by the plaintiff below, and a *venire facias de novo* awarded, it will be unnecessary to consider in detail the fifteen errors assigned on this record. It is quite sufficient to say that under the decision of this court in *Lucas v. Government National Bank*, 28 P. F. Smith, 228; s. c., 21 Am. Rep. 17, we find no errors in the answers of the learned court below of which this plaintiff has any cause to complain. The objections to evidence which were overruled were on the grounds of variance to counts in the declaration, upon which, in the end, the court did not enter judgment. There is technically an error in the judgment, according to the view of the learned court below. The counsel on both sides assumed that the last count in the declaration was three counts from its including in one demand debt for money had and received, money paid, laid out and expended, and money found due on an account stated. The entry of judgment on the last three counts was in fact an entry of judgment on the ninth, tenth and last count, the ninth and tenth being for the penalty. The judgment is wrong and must be reversed, although if the cause had not to go back for another trial this error might be corrected in this court.

What the learned counsel for the plaintiff in error principally insisted upon in his oral argument, as ground for a reversal without a *venire de novo*, was a point which does not appear to have

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been made below and which does not arise on this record. It is contended that under the act of Congress establishing the national banks, those institutions have a right to charge and receive whatever amount of interest any banks of issue chartered by the State have a right to receive, and that several banks of issue were incorporated and in existence during the period that the alleged usury was paid in this case, who might lawfully make any contract with their debtors on the subject of interest. In the Circuit Court of the United States for the western district of Pennsylvania the point was so ruled by Justices STRONG and McKENNAN, reversing a judgment of the District Court. *First National Bank of Mt. Pleasant v. Duncan*, 25 Pitts. Leg. Jour. 169. The ruling in that case was on the rejection by the District Court of an offer to show that there were State banks of issue authorized by special charters to charge and receive more than six per cent. We give no opinion upon this question. No offer was made in the court below to give such evidence. It is contended now that the court will take judicial notice of the fact. No doubt in New York and other States the court will take judicial notice of institutions organized under a general banking law. Although the general banking law of April 16th, 1850, Pamph. L. 477, is undoubtedly a public act, and where the charter of any particular bank is produced and proved, the court will take judicial notice of its provisions; yet without such proof it cannot take notice of the charter. A bank is a private corporation, its charter a private act, to be pleaded and proved as all other private acts. It has been held by the District Court of Philadelphia in *Handy v. The Philadelphia & Reading Railroad Co.*, 1 Phila. 31, that an act which declares that loans and contracts previously made by any person with a particular corporation shall not be deemed usurious by reason of the corporation agreeing to pay more than legal interest, is a private act.

Chief Justice AGNEW filed a concurring opinion, discussing the question what constitutes a bank of issue.

Judgment reversed and venire facias de novo awarded.

Lazear v. Porter.

LAZEAR v. PORTER.

(87 Penn. St. 513.)

Bankruptcy — dower — when not barred by.

A bankrupt's wife is not barred of dower by the sale of her husband's lands by the assignee in bankruptcy.

ASSUMPSIT. The opinion sufficiently states the case. The plaintiff had judgment below.

Thomas C. Lazear, for plaintiff in error.

W. D. Porter, for defendant in error. A sale under a judgment against the husband alone, or a mortgage in which the wife does not join, bars the wife's right of dower. *Scott v. Croasdale*, 1 Yeates, 75; 2 Dallas, 127; *Directors of the Poor v. Royer*, 7 Wright, 146. A sale of a decedent's land by the Orphans' Court bars dower. *Mitchell v. Mitchell*, 8 Barr, 126; *Helfrich v. Obermyer*, 3 Harr. 113. A judicial sale in this State will bar the wife's right of dower. *Worcester v. Clark*, 2 Grant, 84.

TRUNKEY, J. The question presented is, does the sale of the lands of a bankrupt by the assignee divest dower of the bankrupt's wife?

By operation of law the title of the bankrupt's real estate is vested in the assignee from the date of the commencement of the proceedings in bankruptcy. R. S. U. S., § 5044. The assignee shall sell the unincumbered real estate on such terms as he thinks most for the interest of the creditors. R. S. U. S., § 5062. He shall have authority, under the direction of the court, to redeem or discharge any mortgage or lien upon the real estate, or to sell the same subject to such mortgage or lien. R. S. U. S., § 5066. On application of any party in interest the court shall have complete supervisory power over such sales, including the power to set aside the same and order a resale. Act of United States, June 22, 1874, § 4.

In Pennsylvania an insolvent debtor, under arrest and imprisonment, to procure his discharge, shall execute an assignment of all his estate to trustees nominated by his creditors and appointed by

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the court. Act 1836, Purd. Dig. 779, pl. 22d. The trustees shall be deemed vested with all the estate of the insolvent, at the time of filing his petition, subject to liens. Act 1836, Purd. Dig. 782, pl. 42. They shall convert the estate into cash and make distribution among the creditors. Act 1836, Purd. Dig. 780, pl. 22. The property of the insolvent vests in the trustees by operation of law, not by virtue of the assignment. *Ruby v. Glenn*, 5 Watts, 77.

The salient points, touching the question in hand, of the Bankrupt Law and Insolvent Debtor Act, have been noted, the better to observe the similarity of the title which passes to the assignee in the one and trustee in the other, a title created by operation of law, in each, in trust for creditors. The entire estate of the bankrupt is transmitted, so of the insolvent. The assignee is subject to the power and direction of the court, and so is the trustee. In each the estate is to be converted into money for payment of debts, and the accounts are subject to examination of the respective courts. Nothing is said, in either statute, of the incipient estate of the bankrupt's or insolvent's wife. The revised act of 1836 was a reenactment of prior statutes of like tenor relative to insolvents. At an early day it was held that the quasi-judicial proceedings for disposition of insolvent's estates did not defeat the right of dower. *Keller v. Micheal*, 2 Yeates, 300. At a later day the same doctrine was held in *Eberle v. Fisher*, 1 Harr. 526, when the court said: "In 1822 our insolvent laws required the assignment to be made when the unfortunate debtor was in custody. He must so make it to obtain his discharge. His creditors designated and the court appointed the trustee. The interest which his assignee had was precisely his interest and no more. He sells his effects, real, personal and mixed. He collects his debts and he divides the fund according to law among the creditors. If a surplus, he returns it to the debtor. The wife is not named in our insolvent laws, and if the insolvent has real estate, which is sold by the trustee, and she survives her husband, she is entitled to dower in that estate." By parity of reasoning the purchaser from an assignee in bankruptcy takes subject to the bankrupt's wife's right of dower. So held the learned and able judge of the United States District Court for the Eastern District of Pennsylvania. *In re Angier*, 4 N. B. R. 619.

Of course, as said by defendant in error, "the general principle that a judicial sale in this State will bar the wife's right of dower will not be questioned." Nor will the principles held in *Directors*

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of the Poor v. Royer, 7 Wright, 146. Nor will we say that the very foundation of those principles is, that the debts are liens at and immediately before the seizure and sale. We are not convinced that an assignee's sale is within the rule. We see no substantial distinction between it and a sale by a trustee under our statute. Hence, we wholly dissent from the dictum in *Worcester v. Clark*, 2 Grant, 84, that "On general principles long recognized in Pennsylvania, that lands are assets for payment of debts, and that dower is barred by a sheriff's sale, in virtue of either a judgment or mortgage executed by the husband alone, I should have no difficulty in holding, that a sale in pursuance of a decree in bankruptcy would also bar dower, were it not for the third proviso to the 2d section of the act of Congress of 19th August, 1841." Dower is a legal, an equitable, and a moral right. It is favored in a high degree by law, and, next to life and liberty, held sacred. MCKEAN, C. J., *Kennedy v. Nedrow*, 1 Dall. 417. A widow's right of dower commences with her marriage; it is held so sacred a right, that no judgment, recognizance, mortgage or any other incumbrance whatever, made by the husband after the marriage, can, at common law, affect her right of dower; even the king's debt cannot affect her. SHIPPEN, P. J., *Graff v. Smith*, 1 Dall. 484. The only modification of these principles, that we have suffered, is in treating the rights of creditors as paramount, and permitting them, through a judicial sale, to bar dower; a policy often questioned and which is not to be extended beyond established limits. WOODWARD, J., *Worcester v. Clark*, *supra*. That policy, from any principle of analogy, should not be extended a whit farther. It has been carried too far and has too often divested estates of women, incident though they be to the marital relation, when no equitable principle so required. Nothing should be taken to prejudice a wife's estate by mere inference. A statute ought not to be interpreted as authorizing a sale of the husband's lands, freed from dower, unless such is its clear intendment. Were the meaning of the bankrupt law and the effect of a sale of the bankrupt's land, as to dower, doubtful, the conclusion must be that the wife's estate is not divested.

Judgment reversed, and judgment is now entered upon the case stated for defendant for costs.

Judgment reversed.

Taylor v. Mitchell.

TAYLOR V. MITCHELL.

(87 Penn. St. 518.)

Covenant not to make will to prejudice of covenantor's heirs.

A sealed agreement, for a valuable consideration, not to make a will to the prejudice of the rights of the covenantor's heirs in his estate, is valid.

EJECTMENT. The opinion sufficiently states the case. The defendants had judgment below.

R. & S. Woods, for plaintiff in error.

S. H. Geyer, for defendants in error. The instrument was testamentary and was revoked by the subsequent will. *Turner v. Scott*; 1 P. F. Smith, 134; *Scott v. Scott*, 20 id. 244.

TRUNKEY, J. William Carson's deed, dated 5th August, 1862, is so far from being testamentary that it contains his covenant not to devise his real estate. The sole question, is whether that covenant shall prevail against his will. A valuable consideration is set forth, namely, a conveyance, for the benefit of said William, by John Carson and Nancy McFadden, of their title and interest in a tract of land which they inherited from their mother; and, for that, said William covenanted, "that I shall not, nor will I by deed, mortgage, sale, judgment, devise or otherwise, prejudice or interfere with the rights of the said John Carson and Nancy McFadden, as my heirs at law, as to their free and equal share in all my real estate, but the same shall remain free and uncontrolled, to be divided equally amongst all my legal heirs, including the said John and Nancy, at my decease." The plain meaning is, that for a valuable consideration, the covenantor agreed to hold his real estate unincumbered, free, and uncontrolled, to be divided amongst his heirs. Had he contracted, for same consideration, to sell his land and give possession at his death, and make provision for conveyance, after his decease, to such persons as should be his heirs, the intent would not be more obvious. For the purpose of reaching the like end he covenanted to stand seized to the use of his heirs.

John Carson and Nancy McFadden were children of William, who also had two other children by his second wife. That natural

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love and affection of the parties to this deed, for the other children, likewise moved them to stipulate, is manifest from the relationship; and were such motive necessary, it is not essential that it be expressed.

Fisher v. Strickler, 10 Barr, 348. Little need be predicated of this farther than showing one object of the covenantees was prevention of the very thing attempted upon the plaintiff.

William Carson died seized of the land, and the devisees stand in his shoes. They are not innocent third persons. Had he died intestate his heirs could not violate the contract; no matter if the deed is not, in strictness, within the statute of Uses and Trusts, 27 Hen. 8, and the conveyances which sprung up in consequence thereof. The consideration was not money, necessary to a *bargain and sale*, nor blood or marriage, necessary, to a *covenant to stand seised to uses*; but it was a valuable one, and between the parties and privies, sufficient to support a contract to hold the land for use of his heirs, their possession to commence at his death. Each party, equitably interested, can recover his portion, in his own name, and is not bound to resort to a personal action for damages.

Judgment reversed, and judgment is now entered for the plaintiff upon the verdict.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
IOWA.

CULVER v. WILBERN.

(48 Iowa, 26.)

Usury — surety — when cannot plead.

A surety who has given his own note in part payment of his principal's usurious note, cannot plead usury in an action upon his own note.

ACTION upon a promissory note, given by defendants alone in part payment of a larger note, executed by Chambers as principal, and the defendants as sureties, which was usurious. Plea of usury. Judgment for defendants below.

Chase & Taylor, for appellant.

H. Jordan, for appellees.

ADAMS, J. We think that the transaction by which the defendants took up the original note was either a payment or purchase, and that in either case the defendants cannot maintain the plea of usury. What the defendants' theory is does not very distinctly appear; but they speak of the note in suit as a substituted note. We presume that their theory is, that the note was given by way of renewal, and that it is therefore subject to the plea of usury, upon the same ground that the original note would be. If the note was given by way of renewal, it would doubtless be subject to the plea

of usury. The question then is: Can the note be properly considered as given by way of renewal? In our opinion, it cannot. To constitute a renewal, the new note should be executed by the principal. Where there is a renewal, the original note becomes extinguished. In this case the defendants caused the original note to be indorsed to them, and they brought an action in attachment on it against Chambers, averring that they had purchased it. It would be singular use of language to say that a note which has been renewed is still outstanding and enforceable. We think that where a surety takes up the note of his principal the transaction is necessarily either a payment or purchase. There are decisions which would seem to indicate that it should be regarded as a payment, and not a purchase. The surety can recover only the amount paid by him, even though he takes an assignment of the claim. *Blow v. Maynard*, 2 Leigh, 54. So the statute of limitations begins to run against the surety from the time of payment, if the note was then due. *Hale v. Andrus*, 6 Cow. 225; *Walker v. Lathrop*, 6 Iowa, 516; *Tillotson v. Rose*, 11 Metc. 299. But whether the transaction in this case be regarded as a payment or purchase, the defense of usury is not available. If it be regarded as a payment, the usurious debt is extinguished. The note given in part payment represents a different debt. The original note is discharged. Whatever claim the defendants have upon Chambers is not upon the note, but upon his implied promise to indemnify them. *Copis v. Middleton*, 1 Turn. & Russ. 224; *Hodgson v. Shaw*, 3 Mylne & Keen, 183. They can recover, as we have seen, what they have paid, and no more. If however they have given their note in part payment, they can include the amount of the note so given, even though not paid. *Rodman v. Hedden*, 10 Wend. 498. Nor can a principal maintain a plea of usury against a surety who has paid his usurious debt. This results from the fact that the surety is entitled to full indemnity, and it is his right to pay immediately upon the maturity of the note, and to seek indemnity. He cannot be subjected to the trouble and delay of waiting to be sued, and then of interposing the defense of usury. In our opinion, it follows that if he has given his own note in part payment of his principal's usurious debt, he cannot maintain the plea of usury against the holder of the note so given. He cannot be allowed to speculate upon his suretyship. Yet that is what the defendants are attempting to do. They have brought an action in attachment to recover

State v. Danforth.

the amount of the original note, and are seeking to avoid their own obligation — the giving of which, if they paid the original note, constitutes the sole basis for their recovery.

If the transaction in question could be regarded as a purchase, so as to give the defendants a right of action upon the original note against Chambers, and if Chambers, in such action, could plead usury, still these defendants could not have recourse to their assignor until they have sustained loss by reason of the usurious character of the note. Code, § 2081.

Judgment reversed.

STATE V. DANFORTH.

(48 Iowa, 43.)

Criminal law — seduction — evidence — resemblance to prisoner of child alleged to be born of the intercourse.

On the trial of an indictment for seduction, a child, alleged to have been born of the alleged intercourse, cannot be exhibited to the jury as corroborative evidence for the prosecution on account of its resemblance to the defendant.

CONVICTION of seduction, alleged to have been effected by the aid of stupefying drugs administered by the defendant. On the trial, the prosecution, under objection, exhibited to the jury an infant proved to have been born to the prosecutrix nine months after the alleged seduction. The other facts appear in the opinion.

John F. Lacey and W. R. Lewis, for appellant.

J. F. McJunkin, attorney-general, for the State.

ROTHROCK, C. J. [Omitting synopsis of evidence.] The court instructed the jury as follows: “If you find that the child resembles the defendant as children resemble their fathers, and your judgment and experience teach you that there is any thing reliable in this appearance that would be safe for you to form an opinion on, then you may consider these matters (meaning this and other facts recited in the instructions) in corroboration of the prosecutrix, and also as testimony to connect the defendant with the commission of the crime charged.”

Steel v. Fife.

An instruction in substantially the same language was given in the case of *Stumm v. Hummel*, 39 Iowa, 478, and it is urged by the attorney-general that this court approved the same. The question as to the right to offer the child in evidence does not appear to have been raised in that case. The court (BECK, J.) said: "This instruction is said to be erroneous, because it does not confine the consideration of the jury to family resemblance. Certainly nothing else could have been understood by the jury. The word 'resemblance' here used implies that likeness ordinarily seen between child and father."

In the case at bar the defendant objected to the child being shown to the jury, and excepted to the instructions, and insists that the action of the court was erroneous, not because the instruction was not clear and distinct in language, but because the resemblance of infants to the father is too indistinct and uncertain to be allowed as evidence in a case of this character. In this view we concur. This child was about three months old at the time of the trial. We have found that aside from this there was no corroborating evidence to warrant a verdict of guilty, and it would be a most unwise and dangerous rule to hold that a man may be deprived of his liberty by reason of a supposed resemblance between a child of that age and himself. See *Risk v. The State*, 19 Ind. 152; *Keniston v. Rowe*, 16 Me. 38.

We think the evidence was insufficient to support the verdict. We need not discuss the other questions presented in the argument of counsel.

Judgment reversed.

STEEL V. FIFE.

(48 Iowa, 99.)

Statute of frauds — memorandum of sale — letter to vendor's agent.

▲ letter written by an owner of real estate to his agent, and received by him, stating that he would sell a certain portion thereof at a certain price, is not an agreement under the statute of frauds, although the agent communicates its contents to a proposed purchaser, who orally agrees to purchase upon the specified terms.

Steel v. Fife.

SUIT for specific performance of contract for sale of real estate. The petition stated that defendants were owners of certain real estate described therein; that plaintiffs applied to Johnson, their agent, to purchase the same; that afterward Johnson informed plaintiffs he had received a letter from defendants stating they would sell a portion of said real estate for \$650; that plaintiffs accepted said proposition, and requested Johnson to procure a deed therefor; but the defendants refused to perform. The plaintiffs had judgment below.

Eugene Cowles, for appellants.

Wakefield & McAndrew and *J. D. F. Smith*, for appellees.

SEEVERS, J. 1. It is not alleged in the petition, or claimed by counsel for the appellees, that Johnson was the agent of the plaintiffs, but that he was the agent of the defendants. This being true, the delivery of the letter to Johnson could have no other or greater effect than if it had been written and retained in the possession of the defendants. It is unquestionably true that a memorandum, agreement or deed must be executed by the party to be bound, or his authorized agent, and delivered to and accepted by the other party to take the case out of the operation of the statute and its clear intent and meaning. In *Grant v. Levan*, 4 Penn. St. 393, there was found among the papers of Robert Martin, deceased, a plat of certain lands on which was indorsed, in his handwriting: "These lands sold to Robert Morris, Esq., of Philadelphia. Deeds poll to him. Purchase-money paid me, Robert Martin. The overmeasure to be cast up and accounted for." It was sought to compel a specific performance. The defense was the statute of frauds. The court say: "But an agreement is the assent of two minds to the same thing; it requires that the written evidence of it, when it is reduced to writing, as well as the agreement itself, should be seen and assented to by both parties. * * * It may be evidenced by a letter sent from the one to the other, and accepted as well as acted upon as an offer of terms, or by a receipt or memorandum sufficiently stating the conditions; but in these instances the paper is parted with as evidence of the thing agreed to. The principle that delivery is necessary to give effect to a written agreement is not confined to specialties."

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In the case at bar plaintiffs never even saw the letter. All the knowledge they had of its contents was derived from Johnson. Nor is the letter before us. Nor have its contents been proven except as its contents were declared or stated by Johnson; and as it never was delivered, but retained in their possession by the defendants, or rather by their agent, we hold that it is not sufficient to take the case out of the operation of the statute.

[Omitting a minor point.]

The cause will be remanded to the court below, with directions to dismiss the petition and render a decree for the defendants.

Reversed.

BURLINGTON AND HENDERSON COUNTY FERRY CO. v. DAVIS.

(48 Iowa, 133.)

Constitutional law — exclusive license to ferry — what is.

A legislature may empower a city to grant an exclusive license to ferry across a navigable river, and the conferring of power to grant or refuse such license authorizes the granting of an exclusive license.*

ACTION to enjoin a ferry. The plaintiffs claimed the exclusive right to such ferry under the following ordinance of the city of Burlington:

“SECTION 1. *Therefore, be it ordered by the city council of the city of Burlington,* That in consideration of the premises, the right to establish and maintain a ferry across the Mississippi river, between this city and the opposite shore in the State of Illinois, is hereby granted to said ‘Burlington and Henderson County Ferry Company,’ for the term of ten years from this date, without charge for wharfage or other tax, license or assessment against the company; *provided* said ferry company shall, in all other respects, comply with the provisions of ordinance No. 14 of the Revised Ordinances of this city, entitled ‘Ferries,’ during said term of years. If the said ferry company fails to run their boat for ten days, when the river is navigable, all the above privileges shall be forfeited; but in case of breakage a reasonable time shall be given for repairs.

*See *Hudson v. Cuero Land and Emigration Co.* (47 Tex. 56), 26 Am. Rep. 293, and note, 293.

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“**SEC. 2.** That the rights and privileges granted to said Burlington and Henderson County Ferry Company are exclusive, and no other license to run a ferry across said river shall be granted by the city of Burlington to any other person, company or body corporate for the term of ten years from this date; *provided* said Burlington and Henderson County Ferry Company shall comply with the conditions and restrictions of said ordinance 14 of the revised ordinances of the city, entitled ‘Ferries,’ or other ordinances hereafter adopted for the regulation of ferries.”

The defendant claimed by license under the laws of Illinois, and by the proceedings of the proper court of Illinois. The plaintiff had judgment below.

Hall & Baldwin and Blake & Hammack. for appellant.

J. & S. K. Tracy and P. Henry Smyth, for appellee.

ADAMS, J. The city council has only such power as has been given it by the legislature. To determine whether the power to grant an exclusive right to operate a ferry at the point mentioned has been given, we have to inquire whether any act has been passed purporting to give such power, and if so, whether the legislature had power to pass such act.

The act of the legislature upon which the plaintiff relies is found in the charter of the city of Burlington, approved June 10, 1845. Section 15 of the charter provides that “the city council shall have power, and it is made their duty to regulate by good and wholesome laws and ordinances all ferries across the Mississippi river from said city to the opposite shore. And the said city council shall have full and exclusive power to grant or refuse license to keepers of ferries from said city across the Mississippi river to the opposite shore.”

The defendant denies that the charter purports to confer upon the city council the power to exclude him from the operation of his ferry. In the first place it is said that the charter purports to grant the exclusive power to license ferries, but not the power to grant an exclusive license to a ferry. In the second place it is said that the power granted is to license ferries *from* the city, and that even if the city council had the power to grant an *exclusive license* to ferry *from* the city, such license would not exclude the defendant's right to ferry from the opposite shore.

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As to the first point, it may doubtless be said that the exclusive power to grant a license is not the same as the power to grant an exclusive license. By granting the exclusive power to license, the legislature doubtless designed to provide that the city alone should exercise such power. *Fanning v. Gregoire*, 16 How. 524. The power to grant an exclusive license must be found, we think, if at all, in other words of the charter. Upon looking into it, we find that it conferred the "power to grant or refuse license." Herein, we think, was conferred the power to grant an exclusive license. The power to license necessarily includes the power to prohibit unlicensed persons from doing the acts authorized by the license. The power to refuse license necessarily gives the power to limit the issuance of licenses. And if the city council has power to limit the issuance of licenses, we see no reason why it may not, in its discretion, and with a view to promoting the public interest, bind itself by contract with a person licensed to issue no other license.

The mere power to license, or to license and regulate, does not, it seems, include the power to create a monopoly. *Chicago v. Rumpff*, 45 Ill. 90; *Logan & Sons v. Pyne*, 43 Iowa, 524. In the latter case, a city ordinance was held void, which was made to confer upon the plaintiffs the exclusive right to run an omnibus line. The power to license useful occupations is conferred upon a city council to enable it the better to regulate the mode in which the occupations should be exercised. For the purpose of such regulation, any reasonable restriction may be imposed; but the exercise of the occupation must be open to all who are willing to comply with the terms and conditions. *Chicago v. Rumpff*, above cited. This is the rule where the mere power to license is conferred. But where the power to refuse licenses is conferred, we think that such rule is not applicable.

We come next to consider that the charter purports only to confer the power to license ferries from the city to the opposite shore.

The defendant claims that he does not need a license from the city, because his ferry is not maintained from the city but from Illinois. He claims that the right which the plaintiffs can exercise under the charter is different from the right which he seeks to exercise, and that the plaintiff's license, therefore, does not exclude him.

The legislature, in conferring upon the city council of Burlington the power to license ferries from the city, conferred all the

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power in that respect which it possessed. It could not give any rights upon the Illinois shore. *Weld v. Chapman*, 2 Iowa, 524; *Gear v. Bullerdick*, 34 Ill. 74. For the same reason the defendant, under the laws of Illinois, could acquire no rights upon the Iowa shore. The fact, then, that the legislature did not confer more power is not an indication that it did not intend to confer the power to exclude persons licensed merely under the laws of Illinois. We must then hold that the plaintiffs' license is exclusive, unless the rights conferred by it are different from those which the defendant seeks to exercise; and upon this point we have to say that we do not think that they are. The plaintiffs are operating a ferry between the city of Burlington and the opposite shore, and the defendant, until he was enjoined, was doing the same thing.

If the license is not exclusive, it must, we think, be for want of power in the legislature. The defendant insists that there is such want of power. Upon this point he says that "the Mississippi river, being a free navigable stream, vessels may land at and discharge passengers at any point between high and low-water mark, for that they have the same right to touch and make fast at and between these limits, which are a part of the river, that they have to float or anchor in mid stream."

Grants of exclusive ferry licenses, however, are upheld. They rest upon peculiar ground. A ferry is in some sense an extension of a public road. Whatever objection there may be to the creation of a monopoly, it is considered as overcome in the matter of a ferry by the consideration of the public necessity or advantage. In *Cooley on Constitutional Limitations*, 593, the author says: "The States may lawfully establish ferries over navigable waters, and grant licenses for keeping the same, and forbid unlicensed persons from running boats or ferries without such license. This also is only the establishment of a public highway, and it can make no difference whether or not the water is essentially within the State, or on the other hand, is a highway for inter-State or foreign commerce." The author cites, in this connection, *Conway v. Taylor's Executors*, 1 Black, 603; *Chilvers v. People*, 11 Mich. 43; *Fanning v. Gregoire*, 16 How. 524. In *Conway v. Taylor's Executors*, above cited, it was held that the authority to establish and regulate ferries is not included in the power of the Federal government to regulate commerce, under the Constitution of the United States. In *Chilvers v. People*, above cited, the court said: "Ferries are as clearly

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creatures of local legislation as roads and bridges ; and the establishment and regulation of them are as necessary for the convenience of the travelling and business public." In *Jones v. Fanning*, Morris, 348, a question arose in regard to the power of the legislature to grant an exclusive license to ferry across the Mississippi river at Dubuque. The court, after considering the objections urged against the existence of such power, said : "The conclusion to which we are brought on this subject is that the Mississippi river, so far as it affords facilities for transportation, cannot be obstructed or monopolized. It is a common highway and forever free. But, so far as it presents an obstruction to land carriage, it is left to the sound discretion of the legislature to provide means for surmounting such obstructions by means of ferries, and for this purpose it may even give individuals exclusive privileges, within reasonable limits, when done in good faith, for the purpose of furnishing an indispensable link in the chain of transportation on dry land." Since this decision a large number of exclusive ferry licenses have been granted in this State, and we are not aware that the power of the legislature has been questioned in this respect, from the time of that decision until it was done in this case.

The point is made, however, by the defendant, that since the decision in *Jones v. Fanning*, a restriction has been imposed upon the power of the legislature in this respect. We are referred to article 1, section 6, of the Constitution of the State. That section provides that "the general assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not belong equally to all citizens." The effect of this restriction we need not consider further than to observe that it has no application to the charter in question, unless the Constitution is retroactive. The charter antedates the Constitution. As to the operation of a Constitution it is said in *Cooley on Constitutional Limitations*, 63 : "We shall venture to express the opinion that a Constitution should operate prospectively only, unless the words employed show a clear intention that it should have a retrospective effect." The learned author, in the same connection, after commenting upon the rule in regard to the operation of statutes, says : "We are aware of no reasons applicable to ordinary legislation, which do not, upon this point, apply equally well to Constitutions." A similar view seems to have been taken in *Albyer v. State*, 10 Ohio St. 588. We are of the opinion that the provision of the

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charter in question did not become void upon the adoption of the Constitution with the restriction referred to.

[Omitting a minor point.]

We think that the demurrer to the defendant's answer was properly sustained.

Affirmed.

ARTHUR V. CRAIG.

(48 Iowa, 264.)

Pardon — conditional — effect of.

The governor may annex to a pardon the conditions that the recipient shall refrain from the use of intoxicating liquors as a beverage during the remainder of the term of sentence ; that he shall use proper exertions for the support of his mother and sister; and that he shall not during the same time be convicted of any criminal offense in the State; and may provide that for a violation of either condition the recipient shall be liable to summary arrest upon the governor's warrant; and upon the breach of the first condition, may revoke the pardon and recommit the recipient.*

PETITION for *habeas corpus*. The petitioner, being in the penitentiary under sentence of felony, received from the governor on the 4th of January, 1876, a pardon conditioned as follows :

"This pardon is granted upon the following conditions, and acceptance and release under the instrument shall be an acceptance of each and all of such conditions, viz. : First, said R. D. Arthur shall, during the remainder of the term of his sentence, refrain from the use of intoxicating liquors as a beverage; second, he shall, during that time, use all proper exertion for the support of his mother and sister; third, he shall not, during that time, be convicted of any offense against any of the criminal laws of the State. Should said Arthur violate either of these conditions he shall be liable to summary arrest upon the warrant of the governor of the State for the time being, whose judgment shall be conclusive as to the sufficiency of the proof of the violation of the first and second conditions, and to be confined in the penitentiary of the State for the remainder of the term of his sentence, and this instrument to be summarily revoked." The petitioner accepted the pardon.

* See *Lee v. Murphy* (32 Gratt. 789), 12 Am. Rep. 563.

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The court below overruled the demurrer upon the ground that the governor could not, without notice to the petitioner, and without a hearing, determine the conditions broken, and on his warrant imprison in the penitentiary, and that he could not exercise the judicial functions necessary to determine the question, because the Constitution gives these powers to the courts alone.

Certain adjudicated cases are relied upon as holding that a violation of a conditional pardon "should be judicially determined and the execution of the sentence enforced by the court pronouncing it, or some other court of competent jurisdiction." *People v. Potter*, 1 Park. Cr. 47; *State v. Dunning*, 9 Ind. 20; *Commonwealth v. Fowler*, 4 Call. (Va.) 35.

Without entering into a discussion of the questions which are determined in these cases, it is sufficient to say that the instrument in the case at bar is unlike any to which our attention has been called. It expressly provides that the governor may by his warrant revoke it upon such showing of a violation of the conditions as he may deem sufficient.

Upon its revocation the legal status of the petitioner must be regarded the same as it was before the pardon was granted. It must be remembered that the pardon was an act of grace. The petitioner had no right to demand it. It was founded on no right which he could enforce in any court. What he accepted was in the nature of a favor or gift. It was not such a contract as entitled him to have a judicial determination of forfeiture, in the face of his stipulation that the governor might revoke it upon such showing as might be satisfactory to him.

We think the demurrer should have been sustained, and the petitioner should have been remanded to the penitentiary.

Reversed.

FARMERS' AND MECHANICS' BANK OF LINEVILLE V. WASSON.

(48 Iowa, 336.)

Corporation — rights of, as to transfers of its stock.

A corporation can avail itself of a provision in its by-laws that transfers of its stock shall not be valid unless approved by its board of directors, only for the purpose of protecting itself against irresponsible stockholders, and not to defeat the rights of third persons.

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In the absence of contract or provisions of the charter or by-laws, a corporation has no implied lien upon the shares of a stockholder indebted to it, to secure such indebtedness.

The president of a bank, who was a surety upon the note of an insolvent stockholder to a third person, took an assignment of his stock for indemnity. The stockholder was also indebted to the bank. *Held*, that in the absence of fraud or concealment, the president had the right to such security as between himself and the bank, and the bank had no equitable right thereto.

GARNISHMENT proceedings. The opinion states the facts. The plaintiff had judgment below.

J. W. Freeland, for appellant.

Vermillion & Haynes, for appellee.

BECK, J. I. Reference need not be made to the form of the proceedings, or to the allegations of the pleadings. No objection is based upon such grounds. The case is submitted to us as a proceeding in Chancery, triable here *de novo*. We will so consider it.

The facts are not intricate, and are subject to but little, if any, dispute, and may be briefly stated as follows:

At the time the indebtedness accrued, which is the foundation of the action wherein the process of garnishment was issued, Wilson was a stockholder and director of plaintiff, and Wasson, the defendant, was, and continued to be at the time the process was served upon him, a stockholder of the bank, and president of its board of directors.

Wilson became indebted to the bank for money borrowed, and for over-drafts. Wasson became his surety upon a note to another for another sum borrowed, and was secured by an assignment of the bank stock in question, which, however, was not made as provided for by the by-laws of the bank. It became known that Wilson was in failing circumstances; thereupon defendant obtained from him a transfer of the fifty shares of stock in controversy, under an arrangement that defendant should pay the debt for which he was surety. The transfer was made by assignment of the receipts given for the payments made upon the stock, and also by the execution of a separate instrument in sufficient form. The transaction was had in the banking-house, in the presence of the cashier, and a memorandum of the transfer was made upon the proper book of the bank. There is no testimony establishing fraud on the part of the

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defendant. He became surety for Wilson, so far as the facts appear in the record, in the regular course of business. He practiced no concealment or artifice upon the other officers of the bank in any of the transactions. The object he had in view in taking the stock as security, and in its final purchase, was to protect himself as surety of Wilson. His good faith is not impugned by the testimony before us.

The articles of incorporation of plaintiff provide that no transfer of stock is valid, except as between the parties, until it is entered upon the books of the bank; and a by-law further declares, that until approved and accepted by the board of directors, it is invalid. The transfer, as we have stated, was entered upon the proper book of the bank, but the directors refused to approve and accept it. Their refusal was expressed after the transactions between defendant and Wilson, and after the assignment had been executed.

Upon the foregoing facts, we are to determine whether defendant acquired property in the stock of Wilson by the assignment, and whether the transactions are of such a character as to create a liability on his part for the value of the stock.

II. The articles of incorporation and by-laws declare that no valid transfer of stock can be made until it is entered upon the books of the corporation. This restriction accords with the law of the State. Code, § 1078. But they also contain a further restriction, to the effect that the validity of a transfer depends upon the approval and acceptance of the board of directors of the bank.

These restrictions are intended for the benefit of the corporation, when its rights may be protected thereby, and to prevent the transfer of stock to irresponsible persons, which, if it should occur, would have the effect to impair the credit of the bank. The restriction first mentioned is necessary, in order that the officers of the corporation may know who are stockholders, which is essential in conducting elections of officers, and for other matters. It can never defeat the rights of other parties, and, in all cases must be regarded as a reasonable requirement. This, if it were not — as it is — in accord with an express provision of the statute of the State, would demand that it be upheld by the courts.

But the same things are not true of the other restriction. While it may be lawfully enforced to protect rights of the corporation, it cannot, in other cases, be exercised without limitation so as to defeat

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the rights of others. If the corporation has no rights to be protected by its exercise, and other parties would be deprived of their property thereby, it cannot be enforced in such cases. Its enforcement would operate as an infringement upon the property rights of others, which the law will not permit. It would, besides, operate as a restraint upon the disposition of property in the stock of the corporation, in the nature of restraint of trade, which the courts will not tolerate. As the restriction is not imposed by express authority of the statute of the State, it cannot, in such cases, be enforced. These conclusions are supported by the following authorities : *Sargent v. Franklin Ins. Co.*, 8 Pick. 90 ; *Quiner v. Marblehead Ins. Co.*, 10 Mass. 476 ; Angell & Ames on Corporations, § 567 ; *United States v. Vaughan*, 3 Binn. 394 ; s. c., 5 Am. Dec. 375 ; *Chambersburg Ins. Co. v. Smith*, 11 Penn. St. 120 ; *Chouteau Springs Co. v. Harris*, 20 Mo. 382.

III. We will now inquire whether plaintiff had any right to the stock in question, or lien thereon, which it was necessary to protect and enforce by the provision of the by-law forbidding transfer of the stock without the assent of its directors.

It is not claimed that plaintiff held any interest in or right to the stock, under any contract, prior to the proceedings of garnishment. In the absence of a contract, its relation to the stock is that of a stranger. The stock is the exclusive, absolute property of the stockholder, and is held by him free from any claim or right of the corporation, in the absence of contract or provisions of the charter or by-laws creating such claim or right, which have not been shown to exist in this case.

In the absence of contract and provisions of the charter or by-laws, a corporation has no implied lien upon the shares of a stockholder indebted to it, to secure such indebtedness. *Mass. Iron Co. v. Hooper*, 7 Cush. 183 ; *Sargent v. Franklin Ins. Co.*, 8 Pick. 90 ; *Heart v. State Bank*, 2 Dev. Eq. 111 ; Ang. & Ames on Corp., §§ 355, 569 ; *Dana v. Brown*, 1 J. J. Marsh. 304.

IV. We discover nothing in the case which, in equity, gives plaintiff a right to the stock in controversy superior to defendant, in view of the official and fiduciary relation held by defendant as president of the bank. We have remarked that the transactions whereby defendant became bound as surety of Wilson, and the stock was assigned as security to defendant, and finally transferred in payment of Wilson's debt, exhibit no circumstances which justify

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the conclusion that defendant practiced any fraud or concealment whereby plaintiff was induced to give credit to Wilson, or to refrain from an attempt to seize the stock. Defendant in good faith became surety for Wilson. The case then stood in this way. Plaintiff and defendant were both creditors of Wilson. Defendant was an officer of plaintiff, but was not exclusively charged with the management of plaintiff's business. Indeed, it was principally conducted by the cashier, as to matters not controlled by the board of directors. The transfer of the stock to defendant was made with the knowledge of the cashier, who interposed no objection thereto, and no effort was made by him or any other officer of the bank to prevent it. Indeed, it is not shown that any intention or desire was entertained by any officer of the bank to subject in any manner the stock to pay the indebtedness of Wilson. It appears, however, to have been understood by all parties at the time that Wilson was in failing circumstances. No principle of equity or law required defendant to refrain from taking the stock in security or satisfaction of the debt for which he was bound, on the ground that he was an officer of plaintiff.

Wilson had the right fairly to prefer defendant in making payments of his indebtedness, and surely defendant had the right to accept such payment. The fiduciary relations of defendant toward the plaintiff, which, it may be conceded, demanded *uberrima fides* in the discharge of his duties, did not require him to sacrifice his own rights under contracts, or appropriate payments voluntarily made upon claims in his favor to indebtedness held by the bank.

The authorities cited by plaintiff's counsel to support their position, that defendant in equity could not accept payment from Wilson, and thereby defeat the right of the bank, are not applicable to the case made by the testimony. The rules recognized by them are applicable to purchases of property or other transactions whereby those discharging duties under fiduciary relations realize profits or benefits from the use of a trust fund. Equity holds the beneficiaries entitled to receive such profits or benefits.

V. The transfer of the stock to defendant did not conform to the requirements of the regulations adopted by the corporation upon that subject. We have seen that the by-law requiring the transfer to have the assent and approval of the directors cannot be enforced to defeat defendant's rights. Failure to follow other requirements of the charter or by-laws would not, in the absence of any rights to

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or lien upon the stock held by plaintiff, defeat defendant's right to hold the stock, and enforce a transfer in proper form. As between Wilson and defendant the transfer passed an equitable interest, at least, in the stock. As against Wilson this equity, it cannot be doubted, may be enforced, and a legal transfer based thereon may be obtained by defendant. The bank, as we have seen, having no lien upon or interest in the stock, can offer no obstacle to the enforcement of defendant's equitable rights. Defendant, therefore, must be regarded in equity as the owner of the stock. This doctrine, we think, is the undoubted rule of the authorities. See Angell & Ames on Corporations, §§ 354, 355, 356, and 575, and cases cited.

The foregoing discussion disposes of all questions arising in the case. The decree of the Circuit Court is reversed, and the cause is remanded for a decree in harmony with this decision.

Reversed.

STATE V. BRUCE.

(48 Iowa, 530.)

Criminal law — trial — use of intoxicating liquors by jury.

A verdict in a criminal case is not vitiated by the fact that some members of the jury drank intoxicating liquors during the trial and before the submission, unless it is shown that the defendant was thereby prejudiced.*

CONVICTION of murder. The opinion states the facts.

Miller & Sons and Craig & Collier, for appellant.

J. F. McJunkin, attorney-general, and D. N. Sprague, district attorney, for the State.

ROTHROCK, J. [Omitting minor points.]

V. In the progress of the trial an order was made by the court that the jury should be kept together, and not allowed to separate. During the time they were thus required to be kept together, and before that time, certain jurors, at different times, drank intoxicating liquors during the adjournments of the court. The most of

* See *Davis v. State* (35 Ind. 496), 9 Am. Rep. 700, and note, 704.

such drinking occurred between the adjournment on Saturday evening and the convening of court on Monday morning. No drinking of intoxicating liquors was indulged in by the jury while engaged in deliberating upon the case. It does not appear that any intoxication was produced by the drinks taken by any juror. On the contrary, certain affidavits which were taken show that the minds of such of the jurors as indulged in drinking were not affected thereby. It is claimed that the verdict should have been set aside for this misconduct of the jury.

The jurors may have been guilty of a contempt of the court for drinking intoxicating liquors as a beverage while they were required to be kept together, yet we do not think, in the absence of a showing of intoxication as the result of the drinking, that there should be a reversal of the judgment on this ground.

It was held, in *The State v. Baldy*, 17 Iowa, 39, and in *Ryan v. Harrow*, 27 id. 494; s. c., 1 Am. Rep. 302, that where jurors indulged in the use of intoxicating liquors after the cause was finally submitted to them, and while they were deliberating upon the case, it was such misconduct as vitiated the verdict, and the use of it in any degree was of itself conclusive evidence of prejudice to the unsuccessful party. We adhere to the rule announced in those cases.

In the case of *Van Buskirk v. Dougherty*, 44 Iowa, 42, it was held that where a juror drank intoxicating liquors during the adjournment of the court and before the cause was finally submitted to the jury, it was not error for the court to overrule a motion to set aside the verdict grounded upon such alleged misconduct, in the absence of a showing of intoxication or prejudice resulting from the indulgence.

There is a wide distinction between the duty of a juror during the adjournment of court pending the trial, and his duty after the case is submitted to him for his determination. Section 4435 of the Code requires that the court, upon an adjournment, must admonish the jury "that they should not converse among themselves on any subject connected with the trial, or form or express an opinion until the cause is finally submitted to them." This requires them to keep their minds in *statu quo*, so to speak, during the progress of the trial, so far as the merits of the case are concerned. If during the adjournment of the court, they do no act which impairs the mind or clouds the understanding, when again called to

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hear the evidence or arguments of counsel, we think it cannot be said there was misconduct to the prejudice of any one. When the cause has been finally submitted, the parties have the right to the calm, deliberate, and sober consideration of the jury, and any conduct which tends to impair this right may well be said to be prejudicial.

An examination of the numerous cases cited in argument has led us to the conclusion that when the indulgence in intoxicating drinks occurs during the adjournment, and before the cause is finally submitted to the jury, the better rule is, in the absence of a showing of prejudice, that the verdict should stand, and we think there is no good reason for making any distinction between civil and criminal causes in the application of the rule.

[Omitting a minor point.]

Affirmed.

ON REHEARING.

SEEVERS, J. So much of the foregoing opinion as holds the verdict should not be set aside because the jury, or some of them, drank intoxicating liquors during the trial, but before the cause was finally submitted to them, has been sharply criticised in a petition for a rehearing.

The confidence seemingly exhibited by counsel has induced us to re-examine this question with the care its importance demands. If we understand counsel, it is claimed the decided weight of authority is against the rule of the opinion. This we regard as a grave error, into which the counsel have fallen through perhaps commendable zeal for the client.

The rule of the opinion is sustained by *Van Buskirk v. Daugherty*, 44 Iowa, 42; *Wilson v. Abrahams*, 1 Hill, 207; *Purinton v. Humphreys*, 6 Me. 379; *Davis v. The People*, 19 Ill. 74; *The State v. Upton*, 20 Mo. 397; *Stone v. The State*, 4 Humph. 27; *Thompson's case*, 8 Gratt. 637; *Coleman v. Moody*, 4 Hen. and Mun. 1; and, if cider be classed as intoxicating, by *The Commonwealth v. Roby*, 12 Pick. 496.

In *The State v. Sparrow*, 3 Murphey, 487, and *Rowe v. State*, 11 Humph. 491, intoxicating liquors were drunk by the jury after they had retired to consider of their verdicts. The verdicts were sustained.

In *Pope & Jackson v. The State*, 36 Miss. 121, and *Gilmanton v.*

Hann, 38 N. H. 108, intoxicating liquor was drank by one of the jurors as a medicine, and the court refused to set aside the verdict.*

In *The People v. Douglass*, 4 Cow. 26, the verdict was set aside because some of the jury drank such liquors during the trial and before the cause was finally submitted to them ; and in *Brant v. Fowler*, 7 id. 562, the jury, at the conclusion of the charge, were permitted by the court to go out before retiring to their room ; during that time some of the jury drank intoxicating liquors and the verdict was set aside. This last case is overruled by the subsequent case of *Wilson v. Abraham*, before cited, and, while the court attempts to distinguish *The People v. Douglass*, we regard it as an entire failure. The latter case should, we think, be also regarded as overruled, and such was our view in *Ryan v. Harrow*, 27 Iowa, 494 ; s. c., 1 Am. Rep. 302 ; and it was so regarded in *Jones v. The State*, 13 Tex. 168.

In the following cases the verdicts were set aside because the jury, or some of them, drank intoxicating liquors after they had retired for the purpose of considering as to their verdict. *The State v. Baldy*, 17 Iowa, 39 ; *Ryan et al. v. Harrow et al.*, 27 id. 494 ; s. c., 1 Am. Rep. 302 ; *The State v. Bullard*, 16 N. H. 139 ; *Leighton v. Sargent*, 31 id. 119 ; *Jones v. The State*, 13 Tex. 168 ; and *Gregg v. McDaniel*, 4 Harr. 367.

In *Dennison v. Collins*, 1 Cow. 111, the trial was suspended for two hours, and during that time, but not within one and a half hour of the time it was resumed, the jury drank intoxicating liquors. The verdict was sustained.

When called into the box, one of the jurors was intoxicated, and the court, on its own motion, directed him to stand aside. This was sustained on appeal. *Bullard v. Spoor*, 2 Cow. 430.

During the trial the jury drank spirituous liquors, and one of them was "disguised with liquor." The verdict was set aside. *Rose v. Smith*, 4 Cow. 17.

These last cases are somewhat exceptional, but they are in accord with the spirit and rule of the opinion.

We have examined and cited, we believe, all the cases to which our attention has been called, and it will be seen the opinion is in accord with the decided weight of authority.

In truth, there is not a single adjudicated case in which a contrary rule has been sanctioned, except the two overruled cases

* To same effect, *State v. Morphy* (83 Iowa 270), 11 Am. Rep. 123.

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in Cowen. Nor will it do to say, in view of the citations we have made, that there is a distinction between civil and criminal cases.

No doubt there can be found, in some of the opinions, suggestions and illustrations used by way of argument, which, at the first glance, seem to be opposed to the rule of the opinion. But all such must be regarded as *dicta*.

In view of the overwhelming weight of authority in support of the opinion, we deem it unnecessary to vindicate or support it by argument, which, however, we believe could be readily and satisfactorily done.

The petition for a rehearing is

Overruled.

STATE V. LEWIS.

(48 Iowa, 578.)

Criminal law — seduction — force.

An indictment for seduction is not supported by proof that the defendant accomplished his purpose by force, and he is entitled to such an instruction if there is any evidence of force.

CONVICTION of seduction. The opinion states the facts.

H. T. Reed, for appellant.

J. F. McJunkin, attorney-general, for the State.

ROTHROCK, C. J. I. The complaining witness testified that the defendant had sexual intercourse with her on two occasions — once on the night of the 7th of October, 1875, and again in two weeks after that time. She stated that on both occasions she resisted the defendant all she could and he overpowered her.

The defendant asked the court to instruct the jury as follows: "If the intercourse was against the will of complainant, and accomplished by force, then the offense charged is not established and you must acquit." This instruction was refused. We think it should have been given. If the intercourse was accomplished by force, and against the will of the prosecutrix, the crime was rape, and not seduction. It is true the witness in other parts of her testi-

mony stated that she let defendant have connection with her because he teased her, and she loved him, and they were engaged. But her last utterance while on the witness stand, upon this subject, was that she resisted all she could and was overpowered. When the witness made two statements as to the manner of the criminal connection so utterly at variance, it was the right of the defendant to have the jury instructed upon the effect of that statement which was favorable to him. We find nothing in the instructions given by the court which covers this point. It is true the jury were instructed as to the necessary evidence to constitute seduction, but we think, as there was evidence which showed that the act was not seduction, but rape, the instruction asked should have been given.

[Omitting a minor question.]

Reversed.

STATE V. NORTHRUP.

(48 Iowa, 588.)

Criminal law — evidence of character — weight of.

In a criminal case it is error to instruct the jury that evidence of good character is of but slight weight and entitled to but little consideration, when the proof is clear and direct. The jury are the sole judges of the weight of such evidence.

CONVICTION of larceny. The opinion states the facts.

L. M. Ryce, for appellants.

J. F. McJunkin, attorney-general, for the State.

SEEVERS, J. I. The principal evidence against the defendants was that of an acknowledged accomplice, without which there could not have been a conviction. The defendants gave evidence tending to show they were persons of good character, and the court instructed the jury as follows:

"14. A person charged with crime is permitted to show, as a circumstance in his defense, that his character as to the trait in-

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volved in the charge was good previous to its being made; and in cases of doubt, or where the evidence is obscure or circumstantial, it may be a strong circumstance when satisfactorily shown, and may of itself be sufficient to turn the scale in his favor.

“15. But generally, it is a circumstance of but slight weight, and entitled to but little consideration, when the proof is clear and direct. The jury are to judge of its weight according to the circumstances in the case before them.”

It is insisted these instructions are erroneous.

At one time the rule was that evidence of good character was admissible in capital cases only. But at the present day the well-settled law is, that the defendant may introduce such evidence in all criminal cases where the object of the prosecution is to punish the offender for the crime. 3 Greenl. on Ev., § 25.

The admissibility being settled, the authorities are not in accord as to its effect, or rather, whether it should be considered by the jury in all cases, or only those in which there are doubts as to the guilt of the accused.

In 2 Stark. on Ev. 303, 7th Am. Ed., it is said that good character is entitled to but little weight, except in doubtful cases, and substantially the same doctrine will be found in 1 Phillips on Ev. 469.

In 3 Greenl. on Ev., § 25, it is said: “The admissibility of this evidence has sometimes been restricted to doubtful cases, but it is conceived that, if the evidence is at all relevant to the issue, it is not for the judge to decide, before the evidence is all exhibited, whether the case is in fact doubtful or not, nor indeed afterward, the weight of the evidence being a question for the jury alone. His duty seems to be to leave the jury to decide upon the whole evidence whether an individual whose character was previously unblemished is or is not guilty of the crime of which he is accused.” This view accords with that expressed in 2 Russ. on Crimes, 785, 786; 1 Bishop’s Crim. Proc., § 488, and Bennett and Heard’s Notes to 2 Lead. Crim. Cas. 351. Neither Roscoe nor Wharton have given their individual views, but they have apparently adopted those expressed by Sir William Russell. Roscoe’s Crim. Ev. 76; Am. Crim. Law, §§ 643, 644.

The leading adjudicated case in favor of the rule that such evidence cannot avail the defendant except in a doubtful case is *The Commonwealth v. Webster*, 5 Cush. 295. See, also, as being in accord therewith, *The State v. Wells*, 1 N. J. L. 424; *United*

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States v. Roudenbush, Baldwin, 514; *The People v. Hammill*, 2 Park. Cr. 223; *The People v. Cole*, 4 id. 35; *United States v. Smith*, 2 Bond, 323.

In *Stephens v. The People*, 4 Park. Cr. 396, and *Lowenberg v. The People*, 5 id. 414, the jury was instructed that good character might raise the doubt entitling the prisoner to an acquittal, and the weight to be given thereto was for the jury in each case. The defendants having been found guilty in each case, no point was raised, as we understand, in the appellate court as to the validity of the instructions.

The doctrine announced in the *Webster* case has been disapproved and condemned in *Cancemi v. The People*, 16 N. Y. 501; *The People v. Ashe*, 44 Cal. 288; *The People v. Garbutt*, 17 Mich. 9; *Harrington v. The State*, 19 Ohio St. 264. The rule of these cases is sustained by *The State v. Henry*, 5 Jones (N. C.), 65; *Jupitz v. The People*, 34 Ill. 516; *The State v. McMurphy*, 52 Mo. 251; *U. S. v. Whitaker*, 6 McLean, 342; *Commonwealth v. Carey*, 2 Brewster, 404; *Epps v. The State*, 19 Ga. 102; *Felix v. The State*, 18 Ala. 720; *Carson v. The State*, 50 id. 134; *Ryan v. The People*, 19 Abb. Pr. 232.

In *Wesley v. The State*, 37 Miss. 327, it is in substance said that good character is no defense, and the better course is to submit the question as to its effect to the jury; but it would be going too far to lay it down as a fixed rule that it is sufficient to raise a reasonable doubt.

This question was somewhat considered in *The State v. Turner*, 19 Iowa, 144. The opinion is exceedingly brief, consisting of but a few lines so far as this point is concerned, and while it may not be clear and certain, yet we think the only rule established is "that in all cases a good character is to be considered."

The instruction given in that case, it was thought, did not militate against the rule above referred to. As to the correctness of this last proposition we incline to think there may be some doubt.

In substance, the jury were told, in the instructions given in the present case, that evidence of the defendant's good character could not be of any benefit or avail them any thing, unless the question of their guilt was doubtful upon a consideration of the evidence other than that in relation to their good character.

As we have seen, the weight of modern authority, whether we look to the text-books or adjudicated cases, is in favor of the propo-

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sition that the good character of the accused is for the consideration of the jury in all cases, and it is for them to determine its weight without any instructions from the court, such as were given in the present case, and this on principle, we think, must be the correct rule.

If the jury have reasonable doubts of the guilt of the accused, it is their duty to acquit. Hence, in that class of cases, the evidence would be unnecessary and useless. But there may be cases, and undoubtedly are such, where, without such evidence, the jury would and should convict; and with it, they would and should acquit. A long and honorable life must be worth something to a man when accused of a crime in cases other than those where the evidence, independent of his good character, is doubtful or obscure. The conclusive presumption must be indulged that juries follow the instructions of the court. Therefore, under the instructions it was their duty first to determine whether the evidence was doubtful or obscure without reference to that in relation to character, and if this question was determined in the affirmative, then a verdict of guilty follows.

This places the man who affirmatively establishes a good character on the same plane with one who has not or cannot do so. No presumption exists against one who does not attempt to establish a good character except such as can be legitimately drawn from the evidence. Therefore, the same quantity and quality of evidence should make a clear or strong case against both. The evidence which creates a doubt, unless good character may be considered in determining whether such a doubt exists or not, must necessarily be the same as to all men and cases, if the rule of the instructions in this case be correct.

We cannot subscribe to any such doctrine. Good character, like all other facts in the case, should be considered by the jury, and if therefrom a reasonable doubt is generated in the mind of the jury as to the guilt of the accused, it is their duty to acquit.

Of course we must not be understood as saying that good character is a defense, for it is not as a matter of law. But it is a fact for the consideration of the jury, as are all the other facts in the case, and they must determine its weight in all cases.

[Omitting a minor question.]

Reversed.

RAUSCH V. MOORE.

(48 Iowa, 611.)

Dower — when not liable to attachment.

An unassigned dower interest is not liable to attachment, although by statute it is a fee simple instead of a life estate.

ACTION on a judgment against a non-resident. An attachment was levied on the defendant's interest in real estate, which was shown to be only an unassigned right of dower. The attached property was discharged.

D. D. Applegate and L. G. Kinne, for appellant.

Struble & Goodrich, for appellee.

ROTHROCK, C. J. [Omitting minor considerations.] Lastly, it is claimed that the unassigned dower interest of the defendant in the land in question was subject to the attachment. This is the principal question in the case.

The court below held that it was not liable to be seized under the writ. Where the common-law dower of a life estate is in force the great weight of authority is that, until it is assigned or set apart to the doweress, it is not liable to attachment on execution, in a suit at law by a creditor of the widow. Counsel for appellant concedes that this rule is supported by a majority of the cases. We need not take the space to make citations. The rule, upon examination, will be found to be nearly uniform in the courts of England and this country.

It is insisted, however, that in the case at bar the defendant, as widow, is entitled to one-third in fee simple of the land in controversy; that the descent was cast at the death of the husband, and that she is a joint tenant with the children of her husband, and for these reasons the rule applicable to common-law dower should not apply.

The defendant's husband died in 1864, seized of the land. The dower right was fixed by section 1, chapter 151, Laws of 1862, which provides that "one-third in value of all the real estate, in

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which the husband at any time during the marriage had a legal or equitable interest, * * * shall, under the direction of the court, be set apart * * * as her property in fee simple. * * *

We have held that this statute did not abolish or take away the estate of dower, but that it merely enlarged it from an estate for life to a fee simple. *Moore v. Kent*, 37 Iowa, 20; s. c., 18 Am. Rep. 1; *Kendall v. Kendall*, 42 id. 464.

If, then, the fee simple estate given by the statute is merely the common-law dower estate enlarged, we can see no reason why it should be subject to execution or attachment in a suit at law, before assignment, in the one case, and not in the other. All the incidents of dower attach to the fee simple estate, the same as to the life estate, the only difference being duration.

It must be remembered that the statute above cited did not abolish the estate of dower, but on the contrary, expressly recognized it by providing that "all the provisions hereinbefore made in relation to the widow shall be applicable to the husband of a deceased wife. Each is entitled to the same right of dower in the estate of the other. * * *"

Whether the provision which the Code makes for a widow out of the lands of her deceased husband creates an estate liable to be seized upon attachment in a suit at law we do not determine, as the question is not presented. It may not be improper to observe, however, that although by section 2440 of the Code the estate of dower is abolished, and in section 2441 the estate given to the widow is designated as "the distributive share of the widow," yet under the Code, as well as under the act of 1862, it is a materially different estate from that derived by descent.

The estate of an heir is an undivided interest in each and every tract of land owned by the ancestor at the time of his death. Subject to the debts of the ancestor, it may be levied upon by execution or attachment, and sold as the property of the heir.

The estate of the widow embraces one-third in value of all the real property owned by the husband at any time during the marriage which has not been sold on execution or other judicial sale, and to which she has made no relinquishment of her right. It cannot be defeated by will. It is not liable for the debts of the husband. It must be so set off as to include the ordinary dwelling-house, unless she prefers a different arrangement. It may all be assigned and set off in one or more tracts.

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It is, therefore, obvious that the levy of an execution or attachment upon the lands of which the husband died seized may or may not be a levy upon that part which may be set off to the widow as her share.

We do not determine what, if any, remedy the creditor of a widow may have as against her unassigned dower. The question is not presented in this record. We only determine that the settled rule that dower unassigned is not liable to execution or attachment in a suit at law was not changed by the statute of 1862 above cited.

Affirmed.

SEEVERS, J., dissented on the ground that the statute gives a vested interest on the husband's death.

SCHMID V. HUMPHREY.

(48 Iowa, 682.)

Sunday — action for damages for injury sustained on.

While the plaintiff was driving on a business errand on Sunday, the defendant's dogs barked at and frightened his horse, thereby causing an injury to the plaintiff. *Held*, that the plaintiff could recover damages therefor, although a statute prohibited labor on Sunday. (*See note, p. 417.*)

ACTION for damages for personal injury. The plaintiff was driving on a business errand on Sunday, when the defendant's dogs ran after and barked at the horse, causing him to run and kick, and the plaintiff, becoming frightened, jumped from the wagon and was injured. The defendant pleaded that the plaintiff was unlawfully engaged in labor on Sunday. The plaintiff had judgment below.

J. W. Rogers & Son and Samuel Murdock, for appellant.

Rickel & Clements, for appellee.

SEEVERS, J. I. The court instructed the jury as follows: "If you find the plaintiff otherwise entitled to recover you are instructed that the fact the accident occurred on Sunday, while the plaintiff was riding on a business errand, will not defeat his right to recover."

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The statute provides : “ If any person be found on the first day of the week, commonly called Sabbath, engaged in any riot, fighting, or offering to fight, or hunting, shooting, carrying fire-arms, fishing, horse-racing, dancing, or in any manner disturbing any worshiping assembly or private family, or in buying or selling property of any kind, or in any labor, the work of necessity or charity only excepted, every person so offending shall be punished.” Code, § 4072. Conceding the plaintiff was engaged in labor, does it therefore follow he cannot recover ?

He is not seeking to enforce any contract which is prohibited by law, nor is he seeking to enforce any right obtained by the breach of any law. Suppose it be said the plaintiff was doing something prohibited by law, but which in no manner concerned the defendant, or disturbed him in any of his rights or privileges, will it do in such a case to say that the plaintiff is no longer under the protection of the law, and that the defendant may with impunity, by the use of positive force or through negligence, do him an injury, and that no civil liability is incurred thereby ? Can the defendant be permitted to set up as a defense the fact that the plaintiff was doing something prohibited by law which did not in fact directly contribute to the injury ? We think not. We are not aware there is any distinction between an act committed, by which a wrong is perpetrated, and the omission to do something by reason of which the same result is reached. Therefore, if one is knocked down and robbed on the Sabbath, can the thought be entertained for a moment that the wrong-doer would not be civilly liable ? His punishment, criminally, does not afford the injured party any redress.

It has been held that a trespasser may recover damages from one who sets spring guns on his premises in a negligent manner, whereby the trespasser is injured. *Bird v. Holbrook*, 4 Bing. 628; *Hooker v. Miller*, 37 Iowa, 613; s. c., 18 Am. Rep. 18. And so may one who, while trespassing on the lands of another, is bitten by dogs. *Loomis v. Terry*, 17 Wend. 496. The fact that a person is a trespasser does not constitute him an outlaw, and warrant another in negligently or wantonly injuring him. For the trespass or wrong, whatever it may be, the wrong-doer is answerable to the offended law ; but his rights as to other persons, and as to other transactions, cannot be affected by that circumstance. A person may be travelling when he has no right to, or in a way prohibited by law, or without the payment of toll when it may be lawfully

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demanded, or at a rate of speed forbidden by law, or on the wrong side of the road, or may have left his team standing in a street without keeping it under his command as the law may require, and in none of these cases does his right of action for an injury sustained by the negligent act of another depend on any of these circumstances, unless what he may have done *directly* contributed to the injury sustained. *Gates v. The B., C. R. & M.R. Co.*, 39 Iowa, 45.

The fact that the plaintiff was at the place at the time he was injured did not directly contribute thereto. As well might it be said if he had never come to Iowa, or been born, he would not have been injured, and that, therefore, by reason of such facts he contributed to the injury. If one knocks another down and senseless, and while in that condition and two hours afterward he is robbed by another, the latter act could hardly be considered the proximate result of the former. So, here, the proximate cause of the injury was not because of the fact the plaintiff was quietly and peaceably passing along the highway. The attack made on him was not the legitimate result of his being in the highway at that time and place. If on the contrary, he had been racing or hallooing, or making any noise or disturbance likely to attract attention, or invite attack by the dogs, a different question would be presented.

In Massachusetts, New York, and other States, travelling on the Sabbath is expressly prohibited, and in the former State it has been held that a person who travels on business or for pleasure cannot recover of a street railway company for injuries received in consequence of the negligence of the company while so travelling in their cars. *Stanton v. Metropolitan R. Co.*, 14 Allen, 485. The contrary doctrine is held in New York. *Carroll v. Staten Island R. Co.*, 58 N. Y. 126; s. c., 17 Am. Rep. 221. In the former State it was held in *Gregg v. Wyman*, 4 Cush. 322, that the owner of a horse who let it on the Lord's day, to be driven for pleasure to a particular place, could not maintain an action of tort against the hirer for driving it to a different place, and in so doing injuring it.

This doctrine is repudiated in *Woodman v. Hubbard*, 25 N. H. 67, and *Morton v. Gloster*, 46 Me. 520, and it has been abandoned in Massachusetts, and *Gregg v. Wyman* expressly overruled in *Hall v. Corcoran*, 107 Mass. 251; s. c., 9 Am. Rep. 30; and we cannot but regard *Bosworth v. Swansey*, 10 Metc. 363, and other cases in

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that State, which hold that towns are not liable for injuries caused to one who is travelling on the Sabbath by reason of a defective highway, as much shaken by the ruling in *Hall v. Corcoran*. But whether this be so or not is not material, as it is barely possible that the liability of towns may depend on a different principle. If not, we are prepared to say that such is not and cannot be the rule in this State.

The views herein expressed are sustained by *Bigelow v. Reed*, 51 Me. 325; *Baker v. City of Portland*, 58 id. 199; *Mohney v. Cook*, 26 Penn. St. 342; *Sutton v. Wauwatosa*, 29 Wis. 21; s. c., 9 Am. Rep. 534; *Kerwaker v. C. & C. R. Co.*, 3 Ohio St. 172; *Phil. & Balt. R. Co. v. Phil. Tow-Boat Co.*, 23 How. 209.

II. The twelfth instruction has reference to the degree of care to be exercised by the plaintiff after the horse became frightened. The rule of the instruction is that he must have used ordinary care. The appellant insists that, under the circumstances of this case, he should have been held to the exercise of extraordinary care. But conceding there is a practical difference between the two, there is nothing in this case which should take it out of the ordinary rule.

III. The appellant insists that the plaintiff's "negligence contributed to the injury;" "that plaintiff did not maintain his allegations of ownership or harboring the dogs by defendant;" "that the dogs were not proved vicious," and "that no attack was proved;" that is, as we understand, the dogs did not bite or attack the horse. We do not believe it essential that the dogs should have bitten the horse, but it is sufficient if they ran after and barked at him, and there was evidence so tending. The instructions as to the several matters above stated are not, we think, seriously questioned; but if in error as to this, we have no hesitation in affirming their correctness. The real point made is that the evidence does not support the verdict. There was evidence tending to support each point necessary to be proved by the plaintiff, and we are unable to say the verdict is not sufficiently supported by the evidence.

Affirmed.

NOTE BY THE REPORTER.—Of *Baldwin v. Barney*, Rhode Island Supreme Court, March, 1879, we give the following abstract:

A, carefully driving on Sunday along the highway in Massachusetts, was met by B, also driving, whose recklessness caused a collision, which injured A. A sued B, was nonsuited, and excepted. Held, that the nonsuit was error; as for any thing apparent on the record, A might have been on an errand of necessity or charity. Held, further, that even if A was obliged affirmatively to show himself free from contributory

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fault in order to recover, the nonsuit was still error, for the Sunday driving, although in the case at bar a necessary conditional precedent of the accident, was not the efficient cause of the collision. *Steele v. Burkhardt*, 104 Mass. 59; *Spofford v. Harlow*, 3 Allen, 176; *McGrath v. Merwin*, 112 Mass. 467; s. c., 17 Am. Rep. 119. The cases of *Bowditch v. Inhabitants of Swansea*, 10 Metc. 363; *Jones v. Inhabitants of Andover*, 10 Allen, 18; *Stanton v. Metropolitan R. R. Co.*, 14 id. 485; *Smith v. Boston & Maine Railroad*, 120 Mass. 490; s. c., 21 Am. Rep. 538, disapproved. The view taken in the case, though it is at variance with Massachusetts decisions, is supported by many well-considered decisions of other courts of the highest authority. *Phila., Wil. & Balt. R. R. Co. v. Phila. & Havre de Grace Towboat Co.*, 23 How. 209; *Mohney v. Cook*, 26 Penn. St. 342; *Davies v. Mann*, 10 M. & W. 546; *Norris v. Litchfield*, 35 N. H. 271; *Baker v. City of Portland*, 58 Me. 120; *Kerwhaker v. C., C. & C. R. R. Co.*, 3 Ohio St. 172, 195; *Sutton v. Town of Wausau*, 29 Wis. 21; s. c., 9 Am. Rep. 534. In the last-named case, the question is discussed by Chief Justice Dixon with eminent acumen. The subject is also treated with characteristic candor and clearness by Judge Cooley in his recent valuable work on Tort. He expresses the opinion that the weight of authority is now in favor of the conclusion which we have adopted. See, also, Wharton on Negligence, §§ 330, 381 a, 405, 995. Held, further, that even if A was driving on Sunday in violation of law, B could not show the illegality of A's act as a defense. A defendant who is sued in tort cannot justify the tort, whether willful or negligent, by proving that the plaintiff, when injured, was transgressing the law, so long as the tort and the transgression are independent or disconnected, except in time and place in their relation to each other. *Welch v. Wesson*, 6 Gray, 505; *Alger v. City of Lowell*, 3 Allen, 402, 405; *Dimes v. Petley*, 15 Q. B. 276; *Hopkins v. Crumble*, 4 N. H. 580; *Bigelow v. Reed*, 51 Me. 325; *Baker v. Portland*, 58 id. 120; *Hoffman v. Union Ferry Co.*, 68 N. Y. 284; s. c., 7 Am. Rep. 425. See, also, note to *Penn. Co. v. Sinclair*, ante, 185; note 9 Am. Rep. 544; and references 26 id. 84

CASES
IN THE
SUPREME COURT
OF
KANSAS.

FISHER V. CONWAY.

(21 Kans. 18.)

Trial — witness defeating right of party to testify by limiting number of witnesses — impeachment — matters arising since action.

When a party is by law a competent witness in his own suit, his right to testify cannot be defeated by limiting the number of witnesses.

The testimony of an impeaching witness will not be excluded solely because his knowledge has been acquired and is exclusively founded upon matters arising since the commencement of the action.

ACTION of trespass. The opinion states the facts.

Bradley & Nicholson, for plaintiffs in error.

BREWER, J. [Omitting other questions.] Again, it is claimed that the court erred in limiting the number of witnesses on the part of the defense. After four witnesses had testified on the part of the defense to the circumstances of the entry upon the premises, the difficulty with Mrs. Conway, and the threshing, the court refused to permit any further witnesses upon these matters. In

this, we think, the court erred. It is doubtless true as to any collateral matter, as the impeachment of a witness, that the court may restrict the number of witnesses, and unless it appears that there had been an abuse of discretion in that respect, no error will lie. *Anthony v. Smith*, 4 Bos. 503. Perhaps, also, the court may have to some extent a like power, even where the testimony runs to the matter principally and directly in dispute; though see upon this, *Hubble v. Osborn*, 31 Ind. 249; *White v. Hermann*, 51 Ill. 243. But still it may not prevent any defendant against whom a recovery is sought from being heard upon the witness stand as to what he knows of the matters charged against him. Here, the plaintiff sued eleven parties for an alleged trespass. They denied the trespass. That was a denial good for each of them, and each one had a right to tell the jury what he saw and knew of the transaction. The rights of no one defendant were greater than those of any other; and the court could not compel them to select which of their number should be witnesses and which should not, or as appears to have been done, after some had testified, forbid the rest from the witness stand.

Another matter of alleged error is the ruling of the court in reference to impeaching testimony. It excluded all testimony of knowledge of plaintiff's reputation for truth and veracity based upon rumors and reports since the commencement of the action. In other words, the court made this inquiry, "What was the plaintiff's reputation for truth and veracity before the commencement of this action?" and not, "What is his reputation to-day, when he is testifying?" In this was error. Impeaching testimony is for the purpose of discrediting the witness, by showing that the community in which he lives do not believe what he says; that he is such a notorious liar that he is generally disbelieved. It is his present credibility that is to be attacked; is he now to be believed? What do his neighbors think and say of him at the present time? not, What did they think and say months or years ago? True, general reputation is not established in a day; and so the inquiry is not to be restricted to any particular week, or month, or year. The reputation a man has in any community is based upon all the years, few or many, of his living in such community. He may not have entered the community until after the commencement of the action, and still have established a reputation for truth and veracity, or the reverse; for oft-times a case is not tried until years after its

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commencement. This very case was commenced in June, 1876, and the new trial which we direct will not take place until two and a half years have passed since its commencement. Surely, a man's reputation may have changed very much in that length of time. If it were bad, he may have reformed; if it were good, he may have become a moral wreck. *Mask v. The State*, 36 Miss. 77. It is true that when it appears that the impeaching witness bases his testimony upon reports circulated by the enemies of the one whose credibility is attacked, or parties interested in breaking down his testimony, or springing solely out of the prior steps in the controversy, such impeaching testimony carries, as it ought, little weight with a jury; but the weight of testimony is for the jury to determine, the competency alone for the court.

These are the only matters we deem it necessary to notice. No exceptions were taken to the instructions, and if the parties were satisfied with them, it is enough.

For the errors noticed the judgment must be reversed, and the case remanded, with instructions to grant a new trial.

All the justices concurring.

Judgment reversed.

FRYE V. SANDERS.

(31 Kans. 28.)

Partnership — contract with one partner, when binding on firm.

Several plaintiffs were commission merchants dealing in cattle. One of the plaintiffs, without the knowledge of his other partners, agreed with defendant, in the name of the firm, to advance money, with which the defendant was to purchase cattle to be sold by the plaintiffs on commission, the profits to be divided between the plaintiffs and defendant. Transactions under this agreement resulted in loss. No settlement or accounting having been had, *held*, that the plaintiff could not maintain an action upon an implied contract to pay commissions.

ACTION on account. The opinion states the facts. The defendant had judgment below.

W. D. Webb, and *W. H. Campbell*, for plaintiffs in error. This firm could not make a partner with Sanders without the consent

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of all the members. Story on Part., § 5; *Channel v. Fassitt*, 16 Ohio, 166; *Freeman v. Bloomfield*, 43 Mo. 391; *Maclay v. Freeman*, 48 id. 234.

A partner, so far as he acts for himself, is a principal, but so far as he acts for his copartners, is an agent only. Story on Part., §§ 1, 101, 102; Story on Agency, §§ 124, 125, 126; 3 Kent's Com., § 43; *Central City Savings Bank v. Walker*, 66 N. Y. 424; *Alexander v. State*, 56 Ga. 478.

If the partner or agent exceeds his actual or apparent authority, such act in excess of such authority does not bind his principal or his firm. Story on Agency, §§ 126, 165, 172; 3 Kent's Com. (marg. page), 42, 43; *Payne v. Potter*, 9 Iowa, 549.

Price & Heatley, for defendant in error.

BREWER, J. Plaintiffs alleged that they were partners, engaged in the business of commission merchants in Chicago; that defendant shipped cattle to them, which they sold on commission, and that out of these transactions a balance was still due them. Defendant answered, denying any indebtedness, and claiming a special partnership with plaintiffs, alleging that he shipped the cattle under an agreement that plaintiffs should charge no commissions; should advance money to defendant with which he should buy cattle and ship to plaintiffs, and that the profits and losses should be divided; and loss resulted, and that plaintiffs were indebted to him, instead of him to plaintiffs. The testimony showed that defendant made such a contract with Jacob Frye, one of the partners plaintiffs; that the other partners knew nothing of it, and supposed the cattle were shipped to them in the ordinary line of their business as commission merchants. The court found that such contract with one partner, without the knowledge of the others, was a fraud upon them, and did not as to these transactions constitute defendant a partner with plaintiffs, and that therefore he could recover nothing of them; and on the other hand, that as these cattle were shipped to the firm under the special contract with one member thereof, the firm as a firm could not ignore the contract and recover of the defendant as though he were an ordinary shipper. Plaintiffs alleged exceptions. They say that one partner in a firm cannot, without the consent of his copartners, introduce a new member into the firm; that therefore this alleged special partnership agreement between Sanders and Frye was void as to them, and being void, the law implies

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a valid contract between them as commission merchants and Sanders as shipper. We think the exceptions of the plaintiffs must be overruled. We agree with the proposition that one partner cannot introduce a new member into the firm without the consent of his partners. But this does not deprive a partner of the power to bind his firm to receive compensation for their services in any particular transaction upon the basis of a share in the profits of that transaction; providing always that the transaction was one within the scope of the ordinary business of the firm. It appears from the testimony that when plaintiffs' firm consisted of but two members (half its present number), defendant and his then partner made a similar contract with them, shipped cattle, and settled upon the basis of such contract. It also appears from some of the testimony that plaintiffs were live-stock and commission merchants. This description would be broad enough to include dealing in cattle otherwise than upon commission, the buying and selling on their own account; and in such case the contract found by the court to have been made was one within the apparent powers of one partner. It would be simply the employment of defendant to purchase cattle, with a promise of half the profits as a compensation for his services, or a contract determining the price to be paid him for the cattle he might purchase and ship. Either way it would be as binding upon the firm as a promise by one partner to pay so much a head for the cattle. But taking the case upon the theory that plaintiffs were engaged simply in the commission business, and still we think the judgment of the District Court must be sustained. A contract for the absolute purchase of cattle might not be within the scope of the firm's business, but would a contract for the division of profits in lieu of commission be so far outside such business as to be *ultra vires* of a simple partner? If the profits had been large, could the shipper have repudiated the contract and recovered of the firm the total proceeds of the cattle, less the ordinary commission? or would not the courts have been compelled to say that this was merely one method of determining the commission, a subject-matter of contract within the power of each partner? But going still further, and conceding that the contract was *ultra vires* and not binding upon the firm, still the cattle were shipped under said contract. It was an express and an executed contract. It was unquestionably valid as between Frye and defendant. It was a joint venture of those two. They shared the profits and were liable for

losses. They were partners in it. Can one firm sue another when the same person is a member of each firm? Under the old practice they could not at law (Parsons on Partnership, 288, and following), though in equity and for accounting an action would lie. Perhaps under the Code, and where a simple debt is due from one firm to the other, an action to recover it will lie without any resort to an accounting. *Gibson v. O. F. Co.*, 2 Dis. 499.

But where dealings are had by a party with a firm under an express contract with one member thereof in the name of the firm, which contract creates a partnership in such dealings between the party and the contracting member of the firm, and when completed leaves unsettled accounts between said parties, the firm cannot in its name as a firm, repudiating the express contract as beyond the power of the contracting member to bind the firm, bring an action against such party as upon an implied contract with the firm. The case is one which calls for an accounting, and until that accounting is had, no mere action to recover money will lie. *Non constat* but that the contracting member represents the actual capital of the firm and the others are but nominal partners. May he use the firm-name to repudiate his own contract? Perhaps, on settlement, his own liability to the third party upon the express contract would exceed any possible liability to the firm from the third party upon any supposed implied contract. Ought such third party to suffer the annoyance and risks of a judgment? Will the law ever imply a contract where there was in fact an express contract? *Perry v. Bailey*, 12 Kans. 539. The shipment was made under a contract valid and binding upon the shipper and Frye. Frye's partners may repudiate any liability thereunder. But can they bind the shipper to a contract he did not make in lieu of one he did make?

We see no error in the ruling of the District Court, and the judgment must be affirmed.

All the justices concurring.

Judgment affirmed.

Case v. Allen.

CASE V. ALLEN.

(21 Kans. 217.)

Agister — lien — chattel mortgage.

An agister's lien, created by statute, is paramount to the lien of a prior chattel mortgage upon the same cattle.

REPLEVIN for cattle. The opinion states the facts. The plaintiff had judgment below.

Bradley & Nicholson, for plaintiff in error.

Vrooman & Bertram and *John W. Day*, for defendant in error.

BREWER, J. October 25, 1875, one Forseman sold certain cattle to P. S. Roberts, and to secure the payment, took a chattel mortgage on the cattle. This mortgage was filed for record in the office of the register of deeds of Morris county, November 2, 1875. The stipulation in the mortgage was :

“That if default shall be made in the payment of said sum of money, or any part thereof, or of the interest due thereon at the time or times when by the condition of said obligation the same shall become payable, or if the said party of the second part shall at any time deem himself insecure, then and thenceforth it shall be lawful for the said party of the second part, his executors, administrators or assigns, or any authorized agent, to enter upon the premises of the said party of the first part, or any other place or places where said goods and chattels aforesaid may be, to remove and dispose of the same, and all the equity of redemption of the said party of the first part, at public auction or at private sale, to the person or persons who shall offer the highest price for the same. After satisfying the aforesaid debt and interest thereon, and all the necessary and reasonable costs, charges and expenses incurred, including reasonable attorneys' fees, out of the proceeds of said sale, he shall return the surplus to the said party of the first part, or his legal representatives ; and if from any cause said property shall fail to satisfy said debt and interest aforesaid, said party of the first part hereby agrees to pay the deficiency ; and until default be made, as aforesaid, or until such time as the said party of the second part

shall deem himself insecure, as aforesaid, the said party of the first part shall continue in the peaceable possession of all the said goods and chattels, all of which, in consideration thereof, he engages shall be kept in as good condition as the same now are, and taken care of at his proper cost and expense."

Roberts, during November (the exact time in the month not appearing), turned the cattle over to defendant in error to winter, at an agreed price of five dollars per head. Defendant in error was a farmer, and engaged in the business of pasturing and feeding cattle. He kept the cattle until spring, under such contract. In the spring, Forseman, the mortgagee, indorsed the notes and assigned the mortgage securing them, to the intestate of plaintiff in error, who immediately took possession of the cattle without paying for their wintering. Defendant in error thereupon commenced this action. Upon the trial the District Court instructed the jury that—

"If they found from all the evidence that said Roberts, after making said chattel mortgage, turned over to said Allen said cattle to winter, and agreed to pay him for such wintering the sum of five dollars per head, and that said Allen did take possession of said cattle and winter the same in accordance with his contract, then he would be entitled to a lien upon said cattle for the amount due him for the wintering and keeping the same, and would be entitled to the possession of the same until such lien was satisfied; and if they so found, and further found, that Allen has never been paid the amount due for such wintering and keeping, and that he did not willingly give up the possession of the same, but that the same were forcibly taken from his possession without his consent by the said R. Case, he would be entitled to recover in this action — unless, however, they found that Allen looked to Roberts alone for his pay, and not to the cattle. But any agreement between Roberts and Forseman, that Roberts should keep said cattle without expense to him (Forseman), would not be binding upon Allen unless he knew of such agreement, and assented thereto."

This instruction presents the substantial question in the case. By it the lien of the mortgagee was subordinated to the lien of the agister. Was this error?

All parties were residents of Morris county, and chargeable with notice of the chattel mortgage from the time of filing, to wit, November 2, 1875. The lien of the mortgagee was prior in time, was created by contract, while that of the agister, later in time,

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arises out of the statute. Though the amount in controversy is small, yet the question is of some importance. It affects a great many of the smaller transactions of business. A buggy is taken to a shop for repairs; a horse is driven to a livery-stable and left over night; a traveller brings his trunk and stops at a hotel; in all these cases a lien is given by statute. Suppose a prior chattel mortgage exists, must the statutory lien give way to the prior contract lien? Must a mechanic, a livery-stable or hotel-keeper always examine the register's office to see whether there be a chattel mortgage upon the property before receiving it for repairs or keeping? But the question is not free from difficulty, for can the value of a contract lien be diminished by any act of the promisor? Can he who has promised that the property shall, to the extent of its value, be security to the mortgage, for a certain debt, subsequently cast upon it a lien which shall take precedence of his prior contract, and to that extent diminish the value of the mortgagee's security? It will be conceded that no subsequent contract lien can be placed upon the property to take precedence of the prior chattel mortgage, and to that effect is the case of *Bissell v. Pearce*, 28 N. Y. 252. But we think the District Court rightly held that the agister's lien was paramount to the mortgage. The express stipulation in the mortgage, that the keeping of the mortgaged property should be at the expense of the mortgagor, is no more than the law would imply in the absence of any express agreement. The mortgagor retaining possession must of course pay the expenses of the keeping. He is not simply an agent of the mortgagee. He can make no contract on behalf of, or which will create any liability against, the mortgagee; he acts on his own behalf. He is the owner, with the duties of owner and the powers of owner, except as limited by the restrictions of the mortgage. Unless the mortgagee, by express contract, assumes the expense of the keeping of the property, it rests upon him.

Now the lien of the agister is not the mere creature of contract; it is created by statute from the fact of the keeping of the cattle. The possession of the agister was rightful, and the possession being rightful, the keeping gave rise to the lien; and such keeping was as much for the interest of the mortgagee as the mortgagor. The cattle were kept alive thereby; and the principle seems to be, that where the mortgagee does not take the possession, but leaves it with the mortgagor, he thereby assents to the creation of a statu-

tory lien for any expenditure reasonably necessary for the preservation or ordinary repair of the thing mortgaged. Such indebtedness really inures to his benefit. The entire value of his mortgage may rest upon the creation of such indebtedness and lien, as in the case at bar, where the thing mortgaged is live stock, and the lien for food.

And while it seems essential that this should be the rule, to protect the mechanic or other person given by statute a lien upon chattels for labor or material, the rule, on the other hand, will seldom work any substantial wrong to the mortgagee. The amount due under such liens is generally small—a mere trifle compared with the value of the thing upon which the lien is claimed. The work or material enhances or continues the value of that upon which the work is done or to which the material is furnished; and the mortgagee can always protect himself against such liens, or at least, any accumulation of debt thereon, by taking possession of the chattel mortgaged.

Authorities directly in point are perhaps few, yet the following seem to bear more or less directly on the question: In *Johnson v. Hill*, 3 Starkie, 172, it appeared that one who had obtained wrongful possession of a horse took it to a livery-stable keeper, and left it, and it was held that a lien existed in favor of the latter against the owner. In *Williams v. Allsup*, 10 C. B. (N. S.) 417, a shipwright who had done repairs on a vessel at the instance of the mortgagor was given a lien paramount to that of the prior mortgage; and the same conclusion was reached in the case of *Scott v. Delahunt*, 5 Lans. 372, in which the court, referring to and distinguishing the case of *Bissell v. Pearce*, *supra*, uses this language:

“The decision in that case is no authority against the rights of the plaintiffs to enforce their lien which the law gives, and which does not rest in contract with the mortgagor. I am clearly of the opinion, in a case like this, where the repairs are necessary for the preservation of the property, and the law gives the lien, the mechanic may lawfully retain possession and enforce his lien by action if the charges for repairs are not paid, even against a mortgagee claiming under a prior mortgage.”

In the late work of Herman on Chattel Mortgages, p. 308, the author says:

“Where the owner of a mortgaged chattel places it in the hands of a mechanic for repairs which are necessary to put it in condition

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for use, and the mechanic retains possession until his charges are paid, his lien is prior to and can be enforced against the mortgage, if the mortgage becomes due before the repairs are made and possession retained by the mechanic, where the mortgagee has never taken possession under his mortgage."

And in Brown's Admiralty, p. 204, in the case of *The St. Joseph*, Mr. Justice WILKES thus states the law in reference to maritime liens:

"Strictly maritime liens have always held priority over mortgages, without reference to the period of time when they accrued, on the ground that it is as much for the interest of the mortgagee as for the owner that the ship should be kept in repair and supplied, to enable her to keep afloat and be in receipt of earnings; thus adding to the value of the mortgage security, as well as to the ability of the mortgagor or owner to pay the mortgage."

See, also, *Brown v. Holmes*, 13 Kans. 492; *Colquitt v. Kirkman*, 47 Ga. 555.

It is probable that the amount of the agister's lien, as against the mortgagee, would be fixed, not by the contract with the mortgagor, but by the reasonable value of the services. Still, we think this presents no ground for disturbing the judgment, for the plaintiff testified that he considered the services worth the contract price, and there was no testimony to the contrary, and the attention of the court was not called to the matter, and the exception is to the charge of the court as a whole, and not to any specific portion of it. A similar answer is good to the objection that plaintiff was not engaged in the business of feeding and taking care of cattle, within the scope of the statute giving to such parties a lien.

The testimony does not leave it clear in our minds how many cattle were in fact wintered; but still there was testimony from which the jury might find the amount they did in fact find, and we cannot say that they erred. Upon the whole record, we see no error.

The judgment will be affirmed.

All the justices concurring.

Judgment affirmed.

WILLIAMS V. HADLEY.

(21 Kana. 350.)

Assignment for benefit of creditors — by partners — when general.

L. and B., partners, executed a voluntary assignment for the benefit of creditors, in which their wives joined, transferring all the property, real and personal, of L. and B., except such as was exempt, and signed by them as individuals. In the caption L. and B. were described as copartners doing business under the firm name of L. & Co., parties of the first part, and in the body of the instrument the direction was to pay the debts due from L. and B., "partners as aforesaid." *Held*, that the assignment conveyed the separate property of L. and B. as well as the partnership effects.

REPLEVIN by White as assignee of Luther and Bond, Hadley being subsequently substituted in place of White. Defendant, as constable, pleaded possession of the property by virtue of a judgment in an action against Bond individually. The assignment was as follows:

"This indenture, made this 25th day of September, A. D. 1876, by and between Caleb M. Luther and Nathaniel Bond, copartners, doing business at Lawrence, Kansas, under the firm name of C. M. Luther & Company, parties of the first part, and Joel S. White, of Lawrence, Kansas, party of the second part:

"WHEREAS, the said parties of the first part are indebted to various persons in divers sums of money which they are at present unable to pay, and are willing to assign all their property for the benefit of their creditors: Now, therefore, this indenture witnesseth: That the said parties of the first part, for and in consideration of the premises and of the sum of one dollar to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted and bargained, assigned, transferred, set over and conveyed, and by these presents do grant, bargain, sell, assign, transfer, set over and convey unto the said party of the second part, his heirs, executors, administrators and assigns, all the estate, both real and personal, of the said parties of the first part of every kind and description (excepting such as is by law exempt from execution), including the stock of staple and fancy groceries now in the store occupied and kept by the said C. M. Luther & Company, at number eighty-seven on Massachusetts street, in the

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city of Lawrence, Kansas, together with all the right, title and interest of the said parties of the first part in and to the horses and wagon used by said C. M. Luther & Company in delivering goods, and all of the fixtures of every kind used in and about the store and business of said parties of the first part, and belonging to them, and all notes, credits, accounts, claims and choses in action of every nature belonging to the parties of the first part; to have and to hold the same, and every part thereof, with the appurtenances, unto the said party of the second part, his heirs, executors and administrators and assigns, in *trust*, however, and only to and for the uses and purposes following, that is to say: To sell and dispose of the said hereby assigned property, and to convert the same into money, and to collect the debts hereby assigned, or so much thereof as shall be found collectible, and out of the proceeds of such sales and collections, after first deducting all the costs and expenses of the same, and all the costs and charges of executing the trust created by these presents, and a reasonable compensation to said party of the second part for the services performed in executing said trust, to pay and discharge in full and with lawful interest, if the said net proceeds shall be sufficient for the purpose, all and singular the debts due and owing from the said Caleb M. Luther and Nathan Bond, partners as aforesaid, to every person whomsoever; and if the said net proceeds shall not be sufficient for the payment of the said debts in full, then to apply the same so far as they will extend to the payment of the said debts ratably, and in proportion to the amount thereof without distinction or preference. And we, the undersigned, Sarah E. Luther, wife of the said Caleb M. Luther, and Sarah A. Bond, wife of the said Nathan Bond, do each severally and respectively hereby relinquish and release all claim, right, title and interest in or to the real estate, lands and tenements above conveyed.

“Witness our hands and seals this 25th day of September, A. D. 1876.

C. M. LUTHER, [SEAL.]

NATHAN BOND, [SEAL.]

SARAH E. LUTHER, [SEAL.]

SARAH A. BOND. [SEAL.]

“STATE OF KANSAS, }
County of Douglas, } ss.:

“Be it remembered, that on the 25th day of September, A. D. 1876, before me, a notary public in and for said county and State,

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came Caleb M. Luther and Sarah E. Luther, his wife, and Nathan Bond and Sarah A. Bond, his wife, to me personally known to be the same persons who executed the foregoing instrument, and duly acknowledged the execution of the same.

In witness whereof I have hereunto subscribed my name and affixed my official seal, on the day and year last above written.

[SEAL]

WM. T. SINCLAIR, *Notary Public*.

At the April term, 1877, of the District Court, Hadley had judgment against Williams, who brings the case here for review.

B. J. Horton, for plaintiff in error.

HORTON, C. J. The only question in this case for our consideration is, whether the voluntary assignment of Luther & Bond of September 25, 1876, operated as a transfer and conveyance of the individual property of Bond? If it did so operate, then White, as assignee, was clothed with all the necessary power to obtain possession of the property, and entitled to it wherever it might have been, or in whosoever hands. Against such assignment, counsel contend that the use of the word *partners* therein was intended to designate the capacity in which the assignors were making the assignment, and to limit the assignment to partnership property for the benefit of partnership creditors, and was solely the assignment of Luther & Bond, partners, as C. M. Luther & Co. of the partnership property in trust for their partnership creditors. Therefore it did not include the property in dispute, which was the individual property of Bond. We do not think the assignment will bear this construction. It purports to assign all the property of C. M. Luther and Nathaniel Bond, both real and personal, of every kind and description (excepting such as was exempt), and directs the assignee from the proceeds of the sale of such property and collections of their claims, to pay and discharge in full all and singular the debts due and owing from said C. M. Luther and N. Bond, and if the net proceeds are not sufficient for the payment of these debts in full, then the assignee is required to apply the same ratably and in proportion to the amount of the indebtedness, without distinction or preference. The assignment was executed by both Luther and Bond, and their respective wives released all right, title and interest in the real estate thereby conveyed. It is true that in the body of the instrument where appear the names of Luther & Bond,

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“copartners” or “partners” follows, but these words may be justly treated as descriptive of the persons of the assignors, and not as limiting the assignment to a partial one. Under this view the assignment was general. The partnership effects of the partners and their separate property (not exempt) were conveyed by it. An attempt is made by the counsel for plaintiff in error to present the question of the right of an assignee of a voluntary assignment to impeach or set aside a fraudulent gift or transfer of property, but with no special findings and only a general finding, we cannot assume that the court below found that Bond, prior to the execution of the assignment, had ever parted with the property. The court may have found that there was no gift thereof to the daughter, at least not such a transfer as gave her any title.

The judgment of the District Court will be affirmed.

All the justices concurring.

Judgment affirmed.

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(21 Kans. 412.)

Contract — rescission for fraud — effect of delay.

Mere delay in rescinding a contract on account of fraud is immaterial unless meanwhile innocent third parties have acquired rights, or unless the wrongdoer is injuriously affected by the delay.

EJECTMENT. The opinion sufficiently states the facts. The plaintiff had judgment below.

John V. Sanders, for plaintiffs in error.

Ruggles, Scott & Lynn, for defendants in error.

HORTON, C. J. This action was here at the July term of the court for 1877, and is reported in 18 Kans. 508. It is again brought to this court by the plaintiffs in error to obtain another review of the proceedings had in the court below, which resulted in a judgment of that court against them in the new trial granted by this court. Many exceptions were taken on the trial, and several alleged

errors are set forth in the petition in error, but in the argument contained in the brief of their counsel, the only alleged errors to which our attention is called or reference is made are the refusal of the court to instruct the jury to find for the defendants (plaintiffs in error), and the direction of the court concerning the tender to Blankenship and the acceptance of the same. The latter instruction was as follows: "If they (the defendants in error) had the legal title to the land in controversy, and while so holding the legal title, they were induced by false and fraudulent representations on the part of Blankenship to sell to him, without sufficient consideration, the premises; that after discovering the fraud and before commencing this action they tendered to Blankenship all they had received from him on such sale, and if such tender was received and accepted by Blankenship, then the duties of the plaintiff are prior and superior to those of the defendants (plaintiffs in error); and you should find for the plaintiffs, unless you also find that the plaintiffs by some act or word of theirs are estopped from setting up their equities, if any they have."

The particular point made concerning the instruction refused and the instruction given is, that there was not a valid or a sufficient rescission of the contract to entitle defendants in error to recover. The testimony shows that the agreement to sell the property in controversy to Blankenship by the Smiths was made in the summer of 1871. The fraud of Blankenship was discovered in December, 1871. On January 5, 1874, before this suit was commenced, the defendants in error tendered to Blankenship all they had received from him on the sale of their land, and he accepted the same. Counsel for plaintiffs in error say that the delay of the defendants in error had been so great that the time for rescinding the contract had passed long before it was made, and submit, "that as a reasonable time for rescission is a mixed question of fact and law, and that after the facts are found the law makes the application and determines whether the time was reasonable or not, the law under the circumstances in this case is, that one month would be more than a reasonable time; and if one month would not, six would, and if six would not, one year would; and if one year would not, one year and a half would; and if that would not, twenty-three months would; and consequently, as there was no dispute in the evidence as to the facts, the most of them being proved by Smith himself, the court erred in not instructing

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the jury to find for the defendants, and also in refusing them a new trial."

It is generally true that where any thing of value has been received by the defrauded party, he must not only tender back all he has received, but the rescission must be prompt or within a reasonable time after the fraud is discovered; but mere delay in rescinding the fraudulent contract does not take away the right—such delay being material principally as it furnishes evidence of an election to affirm. The rule is well stated in a late English case, as follows:

"In such cases the question is: "Has the person on whom the fraud was practiced, having notice of the fraud, elected not to avoid the contract, or has he elected to avoid it, or has he made no election? We think that so long as he has made no election, he retains the right to determine it either way subject to this, that if in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position of the wrong-doer is affected, it will preclude him from exercising his right to rescind. Lapse of time without rescinding would furnish evidence that the defrauded party has determined to affirm the contract, and when the lapse of time is great, it probably would, in practice, be treated as conclusive evidence to show that he has so determined." *Clough v. Railway Company*, L. R., 7 Ex. 26.

In this case, all the parties had notice of the intention of the defendants in error to avoid the contract with Blankenship as early as April 8, 1872, when the action was commenced in Lyon county to cancel the blank deed signed by the Smiths and filled up without their knowledge or consent to Wicks and Mays; and as said Blankenship accepted back the property given by him for the land in dispute, such acceptance waives as to him, at least, any defense or claim that there was too great delay in making the rescission. It is even questionable whether the plaintiffs in error can set up and insist upon, as a defense, the right of Blankenship to have a return of his property from the Smiths, or the delay in their making such return, unless by this action the plaintiffs in error have in some way been prejudiced. *Stevens v. Austin*, 1 Metc. 557; *Ladd v. Moore*, 3 Sandf. S. C. (N. Y.) 589; *Pearse v. Pettis*, 47 Barb. 276.

Again, upon the testimony it is doubtful whether the property received from Blankenship under the contract of sale was of any value or possible benefit. If it was absolutely worthless, no tender

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or return of it was necessary. *Bank v. Peck*, 8 Kans. 664; *Smith v. McNair*, 19 id. 330.

In whatever light we may view the subject, this delay in no way affected plaintiffs in error. As before stated, they had notice in April, 1872, of the election of the Smiths to rescind the contract with demand of the property. All the interest the plaintiffs in error acquired, they became possessed of in the fall of 1871, and prior to the discovery of the fraud of Blankenship. As they purchased merely an equitable title, they were bound to take notice of all counter-equities which were outstanding in favor of the defendants in error, who held the legal title, and as Wicks and Mays were claiming only under a mere equitable title, they were not *bona fide* purchasers, so as to defeat prior equities existing in favor of said Smith and wife. *Stout v. Hyatt*, 13 Kans. 232.

[Omitting a minor point.]

We conclude that there was no error in the direction of the court, prejudicial to Wicks and Mays, concerning the rescission of the fraudulent contract, and therefore the judgment of the District Court will be affirmed.

All the justices concurring.

Judgment affirmed.

RUSSELL V. ANTHONY.

(31 Kans. 450.)

Slander and libel — action for words concerning official conduct brought after the plaintiff has left such office.

The defendant published an article charging the plaintiff with corrupt and dishonest conduct in public office, and with having been forced to refund money unlawfully taken and to leave such office. *Held*, that such article is *prima facie* libellous, and the action is maintainable although the plaintiff has left the office.

ACTION of libel. The opinion states the facts. The defendant had judgment below.

Byron Sherry, for plaintiff.

Lucien Baker, for defendant.

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VALENTINE, J. [Omitting a question of practice.] We now come to the merits of the case ; and upon these, the only question presented is whether, upon the pleadings and the evidence introduced by the plaintiff in the court below, a *prima facie* case was made out in favor of the plaintiff and against the defendant. Other questions, however, are involved in the case, but these other questions are all involved in this one principal and general question. This question was raised in the court below — first, by the defendant's demurrer to the plaintiff's evidence ; and second, by a motion of the plaintiff for a new trial. The court below sustained said demurrer to the evidence, took the case from the jury, decided it itself, rendered judgment in favor of the defendant and against the plaintiff, and overruled the plaintiff's motion for a new trial.

The following is a brief history of the case in the court below.

This was an action commenced in the District Court for Leavenworth county to recover damages for libel. The petition alleged as follows :

Edward Russell, plaintiff in this cause, complains of Daniel R. Anthony, defendant, for that the said plaintiff hath heretofore been, and still is, a citizen of the county of Leavenworth, of good name, fame and reputation among his neighbors and fellow-citizens as an upright, honest and honorable man, and hath hitherto been unsuspected of being guilty of either the crimes of embezzlement or perjury ; and for that the said Daniel R. Anthony, being on the 20th day of September, A. D. 1876, the editor and proprietor of a certain newspaper published in the city of Leavenworth, and State of Kansas, called the Leavenworth *Daily Times*, did then and there, in said newspaper, publish and cause to be published of and concerning the said plaintiff, Edward Russell, the following false, scandalous, defamatory and libellous article, to wit :

“ Who is Ed. Russell (meaning the said plaintiff), in whose eyes swindling is no crime ? He is secretary of the bankrupt Kansas Insurance Company. Less than two years ago he (meaning said plaintiff) was State commissioner of insurance, and certified under his oath of office that this bankrupt concern was a sound and solvent insurance company, while he (meaning the plaintiff) knew that it was at that very time hopelessly bankrupt ; he (meaning the plaintiff) was forced to leave the office of commissioner of insurance because the Leavenworth *Times* exposed his official

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‘crookedness,’ and compelled him (meaning the plaintiff) to disgorge eight thousand dollars of the State’s money.”

Whereby and by means whereof, he, the said defendant Daniel R. Anthony, then and there thereby intended to and did falsely and libellously charge the said plaintiff with the crimes of perjury, and embezzlement of the moneys belonging to the State of Kansas, in this, to wit, that the said plaintiff, while he was holding the office and performing the duties of superintendent of insurance of the State of Kansas, had violated his oath of office by falsely and fraudulently issuing a certificate to the Kansas Insurance Company as a solvent company, when he, the said Edward Russell, well knew said company to be hopelessly insolvent.

And also in this, that he, the said Edward Russell, while holding the office aforesaid, and in violation of the duties of said office and of his oath as such officer, had feloniously embezzled eight thousand dollars of the money belonging to the said State of Kansas which came to his, said plaintiff’s, hands by virtue of his said office ; he, the said defendant, then and there well knowing said charge to be false, scandalous and libellous, but contriving then and there and thereby to bring the good name, fame and reputation of the plaintiff into disgrace and contempt with his friends and neighbors.

Concluding with the usual allegation of damages, and prayer for judgment.

To the petition the defendant demurred, on the ground that it did not set forth a cause of action, which demurrer was overruled; whereupon the defendant filed an answer, denying all the allegations of the plaintiff’s petition, except such as he admitted in and by his answer, and then admitting, in substance, that he was the editor and proprietor of the Leavenworth *Daily Times* ; admitting that the article complained of was published in the Leavenworth *Daily Times*, of and concerning the plaintiff ; admitting and alleging that the plaintiff was superintendent of insurance for the insurance department of the State of Kansas, and that he held the office of superintendent of insurance for nearly two years, leaving the office in September, 1874 ; admitting and alleging that the person who held the said office of superintendent of insurance was popularly known and styled “State commissioner of insurance ;” admitting and alleging that when he (the defendant) used the words in said article, “State commissioner of insurance,” he used them in their popular sense to indicate the superintendent of insurance, and

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averring that by the use of said words he intended them to apply to the officer occupying such position under said act of the legislature of Kansas creating such insurance department; admitting and alleging that he intended that said words, "State commissioner of insurance," should apply to the plaintiff as superintendent of insurance for the State of Kansas, and alleging that all of the supposed libellous matters contained in said article were true. To this answer the plaintiff filed a reply denying generally the plea of the truth or justification of said alleged libellous matters.

On the 12th day of March, 1877, the cause came on for trial before the court and a jury.

The plaintiff, to maintain the action on his part, called as a witness John Coulter, who testified that at the time of the alleged publication he was in the employ of the defendant; that he knew of the publication of the article, and that said paper was a paper of large circulation.

The plaintiff then, after having produced a copy of the paper containing the alleged libellous matter, and after having offered and read the article complained of to the jury as evidence, rested his case.

The defendant then filed a demurrer to the evidence, on the ground that the evidence did not establish a cause of action against the defendant, which demurrer was by the court sustained, and to which ruling of the court the plaintiff excepted.

The plaintiff then moved the court for a new trial upon various grounds, which motion the court overruled and the plaintiff excepted. The court then rendered judgment in favor of the defendant and against the plaintiff for costs, and the plaintiff again excepted. The plaintiff then brought the case to this court for review.

Upon what ground the court below sustained said demurrer or rendered said judgment we cannot tell. Upon the pleadings in the case, and without any evidence, the plaintiff was entitled to a judgment in his favor for at least nominal damages, and the evidence introduced by him certainly did not overturn his *prima facie* case which he already had upon the pleadings. The only new material fact proved by the evidence was, that the *Leavenworth Times* was a newspaper of large circulation. This fact tended to enhance his damages instead of utterly destroying his right to recover. We suppose that the article published by the defendant did

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not charge the plaintiff with committing either perjury or embezzlement, at least for the purposes of this case we shall consider that it did not, but it did charge him with committing acts almost as bad. It substantially charged that, while he was acting under an official oath as superintendent of insurance, he knowingly made a false certificate as to the standing of an insurance company, and that he was forced to leave the office of superintendent of insurance because of official "crookedness," and was compelled to disgorge eight thousand dollars of the State's money. Now, if these charges were believed they would certainly injure the private character of the plaintiff; they would bring his private character and the plaintiff himself into contempt and disgrace with all honest men. It was not shown or claimed that said article was intended to injure the plaintiff as an officer, or to lessen his business as such, or to diminish the fees or emoluments of the office; nor was it claimed or shown that the publication of the article would have any such effect. Indeed, the publication of the article could not have had any such effect, for the plaintiff was not holding the office when the article was published. All that the plaintiff claimed was that the publication of the article was intended to and did injure his private character, his good name, fame and reputation, and tended to bring the same into contempt and disgrace among all his neighbors and friends. Such, we think, would be the necessary tendency of the publication of said article. The scope of the article was not to show that the plaintiff was an incompetent officer, or merely to show that he did not perform the duties of his office properly, but it was intended above all things else to show that the plaintiff was a *bad man*, "in whose eyes swindling is no crime." The article was evidently intended to injure the plaintiff's private character. It shows this upon its face, and undoubtedly it did injure the same. Therefore, unless it was true, it was unquestionably libellous, and the burden of proving that it was true rested upon the defendant. A false charge wrongfully imputing a want of integrity is always libellous, whether the object of the charge is in office or not. It is libellous without reference to whether he holds office or not. In the present case the plaintiff alleged in his petition that said article charged him with committing the crimes both of perjury and embezzlement. Now while we do not think that the article so charged, yet we do not think that these allegations of plaintiff's petition rendered the article any the

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less harmful or any the less libellous. Expunge these allegations from the petition, and still the article would be libellous and the petition sufficient. The petition alleged that the article was false and published without any sufficient excuse, and that it was intended to injure the plaintiff and did injure him, and therefore the petition sufficiently alleged and showed that the article was libellous, although the article may not have charged either perjury or embezzlement. And alleging that the article was worse than what it in fact was does not destroy its libellous character, or render it better than what it in fact was. The allegations stating that the article charged perjury and embezzlement may be treated as surplusage. If the article is in fact true, or if the defendant had a sufficient excuse for publishing it, it devolves upon him to show it. In the absence of evidence, it will be presumed that the article was false, and that the defendant did not have any sufficient excuse for publishing the same. The plaintiff is not bound in the first instance to introduce any evidence upon these subjects, hence it cannot be claimed that his evidence in the court below was insufficient because he did not introduce any evidence upon these subjects. We think the court below erred in sustaining the demurrer to the plaintiff's evidence, and therefore the judgment of the court below rendered upon the sustaining of each demurrer must be reversed, and cause remanded for a new trial.

All the justices concurring.

Judgment reversed.

BUTLER V. BUTLER.

(21 Kans. 521.)

Marriage — action by wife to set aside ante-nuptial conveyance.

In February, 1873, plaintiff was a widow, living in Indiana, and defendant a widower, living in Kansas. In correspondence with her with a view to marriage, defendant stated that he owned two good farms in Kansas and some personal property. In April, 1873, defendant, without any pecuniary consideration, conveyed the farms to his two minor children by his first wife, who were living with him, stating that he designed the conveyance as a provision for them in case his proposed marriage should not prove fortunate. In May, 1873, he visited Indiana, and the parties then became engaged,

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and were married in August, 1873. The deed was recorded August 13, 1873, and the plaintiff had no knowledge of it until long afterward. The defendant provided well for the support of the plaintiff, and no evidence was given of the amount of his property. *Held*, that a refusal to set aside such conveyance as fraudulent was proper.*

ACTION to set aside a conveyance for fraud. The opinion states the case. The defendant had judgment.

A. Smith Devenney, for plaintiff in error, cited *St. George v. Wake*, 1 Myl. & K. 618, 629; *Countess, etc., v. Bowes*, 1 Ves. Jr. 28; *England v. Downs*, 2 Beav. 522; *Howard v. Hooker*, 2 Ch. Rep. 81; *Lance v. Norman*, 2 Cas. in Ch. 79; *Carleton v. Earl of Dorset*, 2 Vern. 17; *Goddard v. Snow*, 1 Russ. 485; *Macqueen's Husband and Wife*, p. 36; *Schouler's Dom. Rel.*, marg. p. 269; *Bright's Husband and Wife*, ch. 13, p. 221; 2 Kent's Com. 174-5, and notes; *Spencer v. Spencer*, 3 Jones' Eq. 404; *Terry v. Hopkins*, 1 Hill's Ch. 1; *Williams v. Carle*, 2 Stockt. 543; *Freeman v. Hartman*, 45 Ill. 57; *Belt v. Ferguson*, 3 Grant, 289; *Duncan's Appeal*, 43 Penn. St. 67; *Fletcher v. Ashley*, 6 Gratt. 332; *Schouler's Dom. Rel.*, marg. pp. 270, 271; 3 Ired. Eq. 388, 544; *Leach v. Duvall*, 8 Bush, 201; *Gainor v. Gainor*, 26 Iowa, 337; *Kline v. Kline*, 57 Penn. St. 120; *Kline's Estate*, 64 id. 122; *Dearmond v. Dearmond*, 10 Ind. 191; 1 Lead. Cas. in Eq. 444, notes, etc.; *Chandler v. Hollingsworth*, Am. Law Reg., May, 1878; *Chambers v. Crabbe*, 34 Beav. 457; *Ramsay v. Joyce*, 1 McMullan's Ch. 236; *Black v. Jones*, 1 A. K. Marsh. 312; *Manes v. Durant*, 2 Rich. Eq. 404; *Linker v. Smith*, 4 Wash. C. C. 224; 1 Story's Eq., § 273, and note 1; 2 Stockt. 551; 1 Shepley, 125.

John P. St. John, for defendant in error *Mary A. Austin*.

BREWER, J. This was an action brought by the plaintiff, Louise Butler, against her husband, William Butler, and his daughter, by a former wife, Mary A. Austin, *née* Mary A. Butler, to set aside a conveyance made by her husband to his daughter shortly prior to her own marriage, and in fraud, as she claimed, of her marital rights. The facts as they appear are, that in February, 1873, plaintiff was a widow living in Indiana, and defendant, William Butler, a widower living in Kansas. At that time, in correspond-

* See *Pierce v. Pierce* (71 N. Y. 154), 27 Am. Rep. 22, and note, 23.

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ence between them, he represented to her that he was the owner of two good farms in Kansas, and some personal property. This correspondence was had with a view to marriage, though the parties were not engaged to be married until the month of May, 1873, when he visited Indiana and remained there for about a month. April 16, 1873, prior to his departure from Kansas, he executed a deed for these farms to his two minor children then living at home with him. He said to them at the time that he was going to Indiana in a few days to get married, and in case the marriage did not turn out all right, he wanted them provided for. The deed was a gift, nothing being paid by them for the land. August 13, 1873, pursuant to the engagement in the month of May prior, Mr. and Mrs. Butler were married, and since then have been residing on one of the farms. The deed was recorded August 18, 1873. Mrs. Butler had no knowledge of this conveyance until long after the marriage. When one of the minors became of age he deeded back to his father the undivided half of this property, receiving in exchange a mortgage thereon for fifteen hundred dollars, payable when the property was sold, or Mr. Butler died. And this action is brought to set aside the conveyance so far as the other minor is concerned. It appears from the testimony that the plaintiff was possessed of but little means at the time of the marriage, but there is nothing showing the extent of Mr. Butler's property. For any thing in the records, these farms in Johnson county may have been but a small part of his estate. He made no defense to the action, and the litigation was between the wife and the minor daughter, then herself married. It appears also that Mrs. Butler has, during her present marriage, been well provided for by her husband. Indeed, she makes no complaint in this respect. No brief has been filed for the defendant in error, so we cannot say positively upon what ground the District Court decided against the plaintiff; but upon the facts as above stated, we think the judgment was properly entered in favor of the defendant and against Mrs. Butler.

It is doubtless true that at common law it was the disposition of courts to hold that a voluntary conveyance of all her property by a woman engaged to be married, made without the knowledge of her intended husband, was a fraud upon his marital rights, and might after the marriage be avoided by him. See, in support of this view, the valuable list of authorities in brief of counsel for plaintiff in error. Whether the same rule obtained, when the hus-

band just before marriage made such a conveyance of his property, is not so clear. See 1 Bright's Husband and Wife, p. 356 ; 1 Leading Cases in Equity, White and Tudor's notes, p. 618.

The reason for the supposed difference in the rule grew out of the different rights each acquired in the property of the other, and the different obligations assumed by each to and for the other by that relation. We deem it unnecessary to enter into any discussion of these matters, for the constant tendency has been to do away with these differences, and give to each the same rights in the property of the other. Of course, when each acquires by marriage the same rights in the property of the other, and is under the same obligations to and for the other, then that which would be a fraud if done by one will, under the same circumstances, be a fraud if done by the other.

It will also be conceded that the course of decision in this country has been in favor of the general proposition, that a voluntary conveyance by either party to a marriage contract of his or her entire property, made without the knowledge of the other and just prior to the marriage, is a fraud upon the marital rights of such other. See, among other authorities, *Swaine v. Perine*, 5 Johns. Ch. 482; 9 Am. Dec. 318 ; *Smith v. Smith*, 2 Halstead's Ch. 515 ; *Petty v. Petty*, 4 B. Monr. 217; *Leach v. Duvall*, 8 Bush, 201 ; *Duncan's Appeal*, 43 Penn. St. 67 ; *Kline v. Kline*, 57 id. 120 ; *Logan v. Simmons*, 3 Ired. Eq. 487.

It may be doubted whether such is the law in Kansas to-day. The writer of this opinion is strongly inclined to believe that it is not. It is a familiar maxim, that where the reason for a rule fails, the rule itself ceases. Now, at common law the husband by marriage assumed responsibility for all his wife's debts, became also the owner of her personal property, and entitled to the use, rents and profits of her real estate. Marriage, therefore, contemplated on his part both the assumption of responsibility and the acquisition of property. The fact that the wife acquired no present interest in any of her husband's property, and only the inchoate interest of dower in his real estate, and assumed no responsibility for his obligations, occasioned the doubt whether the husband's ante-nuptial conveyance was, under any circumstances, a fraud upon the wife. Under our law, marriage involves neither the assumption of indebtedness nor the acquisition of property. Neither the title nor the possession or control of any property,

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real or personal, is changed by marriage, nor does either husband or wife become responsible for the antecedent debts of the other. How can it be said that a woman who the day before marriage gives away ten thousand dollars of personal property, her entire estate it may be, has in any sense of the term defrauded her intended husband, when if she had not given it away the day before she could the day after the marriage, in spite of his objection and beyond the possibility of his restraint? It remains hers after as it was hers before marriage with the absolute right of disposal. And the same is true in respect to the husband's personalty. As to the realty, the proposition, it is true, is not quite so broad. Marriage works no change in the title, the use, or the control of it. The husband is not entitled to the possession of his wife's real estate, nor to the rents and profits, and the estates of dower and by curtesy are abolished. True, in lieu thereof each is entitled, upon the death of the other, to a half of all the real estate owned by the deceased during the marriage, and which has not been sold on judicial sale and is not necessary for the payment of debts, and of which the survivor has made no conveyance; so that there is an inchoate interest to the extent of one-half given to each party in the real estate of the other.

But is this inchoate interest, which may never ripen into a complete title, and which is subject to be defeated during marriage by judicial sale and thereafter by the payment of debts, such an interest as will justify a court in pronouncing fraudulent and void the ante-nuptial voluntary conveyance of either husband or wife?

But it is not necessary to decide this question, and the court declines to express any opinion thereon. Conceding the law to be in accord with the general proposition as first stated, still, upon the facts in this case, the judgment will have to be affirmed, and for several reasons:

The conveyance was made prior to any contract for marriage; and so far as the findings of fact by the court show, it was prior to any thought of marriage. True, it appears from the testimony that the representations to Mrs. Butler and the conveyance were both made during courtship and in view of marriage; but still the fact is undisputed, that the conveyance was made some weeks before any actual agreement to marry was entered into. Would it have been held, even at the common law, that a conveyance before any contract to marry was a fraud upon marital rights? *England v. Downs*, 2 Beavan, 522.

Again, the conveyance was meritorious, and to those having claims upon the grantor. It was to his minor children, and as a provision for them. Surely, the duty of a father to his minor children by a deceased wife is as great as that to a woman he is hoping to wed. It was not an absolute rule that an ante-nuptial voluntary conveyance was fraudulent and void. In Schouler's Dom. Rel., p. 270, it is said :

"From the decisions it would appear that some alienations of the wife's property without her intended husband's knowledge will be allowed to stand. The facts are always open to inquiry, and it seems settled that the court is warranted in considering such circumstances as the meritorious object of the conveyance and the situation of the husband in point of pecuniary means."

Lord THURLOW held that such a conveyance, being made by the absolute owner of the property, was *prima facie* good, and that facts and circumstances must be shown, indicating an intention to deprive the husband of that which he might rightfully and reasonably expect to obtain by the marriage, before it could be adjudged fraudulent and void. *Strathmore v. Bowes*, 1 Ves. Jr. 22.

Chancellor KENT, in his Commentaries, vol. 2, p. 175, says: "If the settlement be upon children of a former husband, and there be no imposition practiced upon the husband, the settlement would be valid without notice," citing *King v. Cotton*, 2 P. Wms. 674; *Jones v. Cole*, 2 Bailey, 330. See, also, *Lyles v. Lyles*, Harper's Eq. 288. And this is right and reasonable. The intent of Mr. Butler in this conveyance was not to defraud the future Mrs. Butler. That was not the purpose which prompted the act. It was done with no hostility to her, no desire to wrong her, nor from any thought of mere personal gain, but from a desire to protect those too young to guard their own interests, and whose interests it was his duty to protect. Perhaps this property had been bought with money belonging to their mother, or if not, it may have been the accumulation of the joint industry and saving of their mother and himself, and it was fitting that the title should be passed to them before he contracted any new matrimonial alliance. Certainly it would seem a misnomer to call such a transaction fraudulent.

And again, it is not shown what property he had at the time of the conveyance. If possessed of large estate, a voluntary conveyance of a small portion thereof to a stranger even, and made after the contract for marriage had been entered into, would scarcely be

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fraudulent. If he retained that which would be ample provision for the support of himself and wife and family, a gift to a stranger would be no fraud upon her marital rights. Surely a contract to marry does not debar a man from all control of his property, or tie up his estate like an order of court.

For these reasons, we think the judgment of the District Court was properly entered in favor of the defendants, and it must be affirmed.

All the justices concurring.

Judgment affirmed.

SCHOOL DISTRICT V. PERKINS.

(31 Kans. 533.)

Contract — by school district — ultra vires.

Under a statute authorizing school district boards to provide "necessary appendages" for school-houses during the time that schools are taught, there is no authority to purchase a stereoscope and stereoscopic views, (See note, p. 450.)

ACTION on contract. The opinion states the facts. The plaintiff had judgment below.

Hill & Salles and Eugene F. Ware, for plaintiff in error.

Harris & Spencer, for defendant in error.

BREWER, J. This was an action by C. O. Perkins against school district No. 29, Bourbon county, on a certain paper writing, in words and figures, to wit:

"STATE OF KANSAS, }
Bourbon County, } ss.:

July 17, 1873.

"M. V. Colt and A. Goucher, school directors of district No. 29, township of Drywood, county of Bourbon and State of Kansas, bought of Chaplin, Colton & Co., one of their 'Wonders of the World,' comprising one book, one stereoscope and one hundred stereoscopic illustrations, at the cost of fifty-eight dollars, to be

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paid on or before the first day of May, 1875, with interest at the rate of six per cent, payable at the First National Bank, Fort Scott, Kansas.

(Signed)

M. V. COLT, *Director*.

A. GOUCHER, *Clerk*."

On the back of said paper writing there was the following receipt, to wit:

"DRYWOOD TOWNSHIP, *October 21, 1873.*

"This is to certify that the within-described school fixtures were received by me, one of the board of school directors of school district No. 29, all in good order.

(Signed)

M. V. COLT."

And also an indorsement from Chaplin, Colton & Co.

The action was commenced before a justice of the peace, appealed to the District Court, where a judgment was rendered in favor of the plaintiff, and the school district now brings its petition in error.

Upon this record it is insisted by the plaintiff in error that without a vote of the district, at a regularly called school meeting, the district board has no power to bind the district by such a contract. This claim we think is correct. The powers of a district board are defined in article 4 of chapter 92 of the General Statutes. Section 46 of that article (Gen. Stat., p. 925) is referred to by counsel as granting such a power, but we cannot so construe the section. It reads: "The district board shall provide the *necessary appendages for the school-house* during the time a school is taught therein." Now a stereoscope, however valuable or useful it may be in a school, can in no proper sense of the term be called an appendage for a school-house. It may be difficult to state exactly what is meant by and included in this phrase, "appendages for the school-house." It would seem to refer to things connected with the building or designed to render it suitable for use as a school-house. But without attempting to define the exact scope of the phrase, it is plain that no reasonable interpretation would enlarge it so as to include a stereoscope and stereoscopic views, which, if not the "toy boy and pictures," as counsel sneeringly call them, are at most but mere apparatus. And provision is elsewhere made for supplying the school with "blackboards, outline maps and apparatus." Sec-

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tion 19 of said chapter provides that a school district meeting, lawfully assembled, shall have power to vote a tax for supplying the school-house with those conveniences. Only upon such a vote can the district board act, and then only to the extent of the tax voted. And this brings us to the second question, and that is whether the fact of such a vote is a matter for the plaintiff to prove, or the want of it a defense for the defendant to establish. We quote from the brief of defendant in error:

“Let it be noticed that it is not claimed, that upon certain conditions and under certain circumstances, the school district officers could not bind the district by the execution of such a paper as is here sued upon, but only that these conditions and circumstances did not exist; that is to say, that the school district meeting had not been held.

“Now, it being admitted that the officers had the power to make the purchase and execute the paper sued on in this action, it was wholly a matter of defense for the district to allege and prove that the conditions and circumstances under which the power to purchase would ordinarily exist did not in fact exist in this instance. That is to say, even if there should have been a school district meeting (and there was not one), still, if the district relied upon that as a defense, it should have alleged and proved it.”

In this we think the learned counsel are mistaken. The contract was not within the ordinary powers of the district board. It was a power which could arise only from express grant by the principal, the district. In such a case the act of the agent is not evidence of the fact of the grant. It devolves upon him who claims that the district is bound by the acts of the board to show the authority of the latter to act. In some cases the statute alone grants the power. In those cases proving the act of the board establishes the claim against the district. In other cases a vote must combine with the statute before the power is created; and then mere proof of the act does not prove the vote or establish the power. This is in accord with the settled law of agency. The denial of the applicability of these rules to negotiable municipal bonds in the hands of *bona fide* holders has been the point around which has raged much of the fierce controversy concerning such bonds. We conclude, therefore, that the fact of a vote was for the plaintiff to prove, and that the making of the contract was not evidence of a power in the board to make it.

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For this error the judgment of the District Court must be reversed and the case remanded with instructions to grant a new trial.

All the justices concurring.

Judgment reversed.

NOTE BY THE REPORTER. — In *Wolf v. Independent School District*, Iowa Supreme Court, June 12, 1879, it was held that lightning-rods are not indispensably necessary to the operation of schools, and an order drawn on the contingent fund of a school district in payment for a lightning-rod erected on a school-house is *prima facie* at least invalid. The court said: "If the erection of a lightning-rod is authorized at all out of the contingent fund, it must be by that general clause, 'all other contingent expenses necessary for keeping the schools in operation.' The word 'necessary' means 'indispensably requisite; that cannot be otherwise without preventing the purpose intended.' Now, whilst lightning-rods upon a school building may be very desirable, and may greatly promote the safety of the building and the security of its inmates, still it is evident that they are not indispensably requisite for keeping the schools in operation, since many schools are conducted successfully without them. Lightning-rods, when erected, constitute a part of the building. They may easily be embraced in the estimates for erecting the building, and paid for out of the school-house fund. *Prima facie*, the order in question, drawn upon the contingent fund for the erection of a lightning-rod, is invalid. If any fact existed which does not appear upon the face of the order, as that it was issued to supply the place of a lightning-rod become useless by age, or the like, and thus coming within the designation of repairs, the burden of proof was upon the plaintiff to show such fact."

In *Allgood v. Hull*, 54 Miss. 666, the right of county supervisors to make an appropriation for setting shade-trees in court-house grounds was questioned. The court said: "The right of a board of supervisors to have shade-trees set in the ground connected with the court-house of its county is fairly implied in the grant of power to such boards by the Constitution and laws in reference to court-houses. Const., art. 12, § 16, art. 6, § 20; Code, § 1863. Shade-trees may be necessary to make a court-house 'good and convenient. There is no express grant of power to have fences made around the court-house yard, or to dig wells or cisterns, or to protect the ground against washing; but as the law empowers the boards of supervisors to acquire so much ground as may be necessary and convenient for the building and use of the court-house, and requires the erection and keeping in repair in each county of a 'good and convenient court-house,' it is incident to this to make convenient and protect this property by the means usually employed in such cases."

CASES

IN THE

COURT OF APPEALS

OF

MARYLAND

MATTER OF TAYLOR.

(48 Md. 28.)

Constitutional law — restriction of right to practice law to white male citizens.

A statute limiting the right of admission as attorney at law to white male citizens is not in conflict with the Federal Constitution.

PETITION by a citizen of Maryland, of African descent, for admission as attorney at law, he having been previously admitted in Massachusetts and in the Federal courts in Maryland.

The petitioner submitted the following argument :

The avocation of an attorney at law is open to every citizen of the United States, and of the State wherein he resides, having the qualifications as to age, legal learning and character, which may be prescribed by law for the admission of attorneys. Constitution of the United States, art. 4, § 2; id., 14th amendment, § 1; *Corfield v. Coryell*, 4 Wash. C. C. 380; *Slaughter-house cases*, 16 Wall. 81; art. 11, § 6, of the Maryland Code.

The fourteenth amendment of the Constitution of the United States prohibits the State from enforcing any law that discriminates

against the negro (race) as a class. *Slaughter-house cases*, 16 Wall. 81; Constitution of the United States, 14th amendment, § 1.

The negro by virtue of his citizenship is entitled to all the privileges and immunities of citizens of the several States. *Corfield v. Coryell*, 4 Wash. C. C. 380-1; art. 4, § 2, of the Constitution of the United States; *Slaughter-house cases*, 16 Wall. 81; *Ex parte Garland*, 4 id. 333; *Paul v. Virginia*, 8 id. 180; *U. S. v. Cruikshank*, 2 Otto, 555.

A State legislature has no power to pass any law that will impose any hardship or unequal burdens upon any of its citizens as a class. *Wally's Heirs v. Kennedy*, 2 Yerg. 554; *Holden v. James*, 11 Mass. 396; 6 Am. Dec. 174; *Lewis v. Webb*, 3 Groenl. 326; Locke on Civil Government, § 142; Cooley on Const. Lim. 390-1, 576, 583 (2d ed.)

Whatever the privileges and immunities of the citizen of a State as prescribed by its legislature in the exercise of its power, they must apply equally to each individual without discrimination on account of race or color. *Corfield v. Coryell*, 4 Wash. C. C. 380; Constitution of the United States, art. 4, § 2; id., 14th amendment, § 1; *U. S. v. Cruikshank*, 2 Otto, 555; art. 11, § 6, of the Maryland Code.

BARTOL, C. J. The mode of admitting attorneys in the courts of this State, and the qualifications required, are regulated and prescribed by the acts of assembly. The provisions on this subject are found in the Code, art. 11.

The *first* section declares that no attorney or other person shall practice the law in any of the courts of this State, without being admitted thereto as herein directed.

The *second* section provides that all applications for admission shall be made in *open court*. The *third* section provides that such applications may be made for any "*free white male citizen of Maryland above the age of twenty-one years*" and prescribes the qualifications required, and the proceedings to be had by the court to determine his fitness and qualifications for admission. This *third* section was repealed and re-enacted with amendments by the act of 1872, chapter 91; and this last act was repealed and re-enacted with amendments by the act of 1876, chapter 264, sec. 3 (found on page 469 of the volume of the acts of assembly of that year). This last act contains the existing law of the State on this subject, and while it has changed the *third* section of the Code,

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before referred to, in some particulars, with respect to the qualifications for admission, and the course of proceeding upon such applications, it contains the same provision, limiting the privilege of admission to the bar, to *white male citizens* above the age of twenty-one years.

The power and duty of this court being thus limited and defined by law, nothing is left for us except to deny the present application; unless it can be held that the provision of the Code, limiting the right of admission to the bar to white men, has in some way been abrogated or rendered inoperative; and this, it is suggested, has been done by force of the provisions of the Constitution of the United States, to which it is said this provision in the Code is repugnant.

In support of this proposition, some reliance has been placed on the *fourth section of the second article*, which provides that "citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." It is clear that this section can have no application, as the petitioner is a citizen of this State. *Bradwell v. The State*, 16 Wall. 138.

But it is said that the provision of the Code which excludes colored men from the privilege or admission to the bar is repugnant to the 14th amendment of the Constitution, and is therefore inoperative and void.

The *first section* of that amendment is in these words:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

In construing this section, we must follow the decisions of the Supreme Court of the United States, whose judgment, as the court of last resort, is final and conclusive upon the question. That court was first called on to construe this 14th amendment in *The Slaughter-house* cases, 16 Wall. 36.

It was there held that the amendment had reference only to the rights and immunities belonging to citizens of the United States as such, as contradistinguished from those belonging to them as citizens of a State.

From the opinion of Mr. Justice MILLER, who spoke for the majority of the court, we cite some passages which appear to be applicable to the present case. On pages 74 and 75 he says: "Of the privileges and immunities of the citizens of the United States, and of the privileges and immunities of the citizens of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause, under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment." "If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment."

Afterward in *Bradwell v. The State*, 16 Wall. 130, the 14th amendment was again considered by the Supreme Court. That was an application of Mrs. Bradwell to be admitted as an attorney in the Supreme Court of Illinois; claiming that the right to be so admitted was a privilege or immunity belonging to her as a citizen of the United States, protected by the 14th amendment, and which the State could not abridge. But the court decided that the right to admission to practice law in the courts of a State, was not one belonging to citizens of the United States *as such*, and consequently was not within the protection of the 14th amendment; but depended on the laws and regulations of the State. The court based their decision on the principles before announced in "*The Slaughter-house cases*" to which we have referred, and said "the right to control and regulate the granting of license to practice law in the courts of a State is one of those powers which are not transferred for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license."

In our opinion these decisions are conclusive of the present case. They determine that the 14th amendment has no application. It follows that the provisions of the Code are left in full force and operation, and must control our action; we cannot set aside or disregard the provisions of the statute; the legislature alone can change the law. The privilege of admission to the office of an attorney cannot be said to be a right or immunity belonging to the citizen, but is

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governed and regulated by the legislature, who may prescribe the qualifications required, and designate the class of persons who may be admitted. The power of regulating the admission of attorneys in the courts of a State is one belonging to the State and not to the Federal government. As said by Mr. Justice BRADLEY in *Bradwell's* case: "In the nature of things, it is not every citizen of every age, sex and condition that is qualified for every calling and position. It is the prerogative of the legislature to prescribe regulations founded on nature, reason and experience, for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the State." 16 Wall. 142.

Application refused.

KIRBY V. CITIZENS' RAILWAY CO.

(48 Md. 168.)

Municipal corporation — right to remove street railway in construction of sewer.

A municipal corporation, authorized to construct sewers, cannot be restrained from the removal of a horse railway from the street, if such removal is necessary for that purpose.

A PPEAL from order of injunction. The opinion states the facts.

John V. L. Findlay, for appellants.

Frank Gosnell and *Thomas M. Lanahan*, for appellee.

ROBINSON, J. The appellee is the owner of a horse railway on Carey street, and the appellants being about to construct a *sewer* under the bed of the street in pursuance of a contract with the mayor and city council of Baltimore, the question is, whether the appellee is entitled to an injunction to restrain them from removing the railway tracks, or from otherwise interfering with the appellee's use of said street for railway purposes.

The power to construct sewers is expressly conferred on the city authorities by section 835 of article 4 of the Code of Public Local Laws.

In the exercise of this power they have the right not only to obstruct, but to discontinue entirely the use of Carey street as a highway, so long as it may be necessary for the purpose of constructing a sewer under the bed of the street.

The *easement* acquired by the appellee under its charter and the ordinances of the mayor and city council is subject to this *paramount right*, and in constructing its railway, the appellee knew, or was bound to know, that its use of the bed of the street for railway purposes was liable at any time to be interfered with, whenever the city authorities might deem it necessary for the public welfare.

They had no right of course to interfere capriciously or unnecessarily with the appellee's use of the street; but they were under no obligation to incur the expense either of *shoring up the railway track, or removing it to the one side of the street.*

The power then being lawful in itself, it could only become unlawful in consequence of the mode in which it was carried into execution. It is apparent from the bill that the sewer could not be constructed without interfering with the railway track of the appellee, and whatever injury may result therefrom must be regarded in law as "*damnum absque injuria.*"

The fact that the sewer was being constructed by the appellants under a contract with the city authorities does not affect the question. The order therefore granting the injunction must be reversed and the bill dismissed.

Order reversed and bill dismissed.

SHAFFER V. AHALT.

(48 Md. 171.)

Slander and libel — charge of adultery — when actionable.

Adultery not being corporally punishable, a false charge of adultery is not actionable without proof of special damage, and sickness produced by the charge is not such damage.

ACTION of slander. The opinion states the facts. The plaintiff had judgment below.

Charles W. Ross, for appellant.

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ROBINSON, J. In suits for slander, pecuniary loss to the plaintiff is the *gist of the action*. Whether it was necessary at first to *prove* in all cases such pecuniary loss, it is not now necessary to inquire. The courts, at an early time, recognized a distinction between words *actionable*, and *words not actionable in themselves*. In the former, the law presumed pecuniary loss, while in the latter, it was necessary, in addition to the words, to prove *special damage* to the plaintiff. Whatever difficulty there may be in defining the precise line of demarcation between these actions, it is well settled, that where one charges another with the commission of an offense, it must be such an offense as subjects the *party to corporal punishment*, in order to render the words actionable *per se*.

Now, adultery was a *spiritual offense* cognizable by the *spiritual courts*, and the punishment was confined to the infliction of penance, "*pro salute animæ*." And hence it was held that to charge one with adultery was not actionable *per se*, and in order to maintain the action, the plaintiff must prove special damage. In this State, adultery is made punishable by a *pecuniary fine*, and to charge one with the commission of the offense is not therefore actionable *per se*.

This is a suit by the husband and wife to recover damages of the defendant for charging the plaintiff's wife with adultery, and the question is, whether the sickness of the wife resulting from this slanderous charge is sufficient to prove special damage. In cases of this kind special damage is that which is naturally the consequence of the words spoken. *Allsop v. Allsop*, 2 L. T. Rep. (N. S.) 290. Now it cannot be said that sickness is the *natural consequence* of defamatory or slanderous words. Such might or might not be the result, depending in a great measure upon the sensibilities and temperament of the person.

The rule of law in regard to special damage was adopted with reference to common and usual effects and not such as are occasional and accidental.

And hence in *Allsop v. Allsop*, above referred to, the defendant said that the plaintiff's wife had committed adultery with him, and the declaration alleged that in consequence of said charge, the wife became and was ill for a long time and unable to attend to her business, and the plaintiff was put to and incurred much expense in and about the endeavoring to cure her of her illness, and it was held, upon demurrer, that the declaration disclosed no cause of action.

POLLOCK, C. B., said: "I can find no authority, nor has any been cited in the history of the law of this country, for any such special damage as that stated in this case, being made the ground of an action, or to make actionable that which otherwise would not be so. The important distinction in this case, although not the only one, is, that the mischief done depends entirely on the temperament of the individual affected by the words spoken, whether any damage would result or not."

MARTIN, B. "The special damage is that which is naturally the consequence of the act done, and the peculiar temperament of the party injured would be a bad standard by which to estimate damage."

BRAMWELL, B., and WILDE, B., were of the same opinion.

See, also, *Terwilliger v. Wands*, 17 N. Y. 54, and *Wilson v. Goit*, id. 442, where the question was considered and decided as in *Allsop v. Allsop*.

The court below, therefore, erred in refusing the instruction offered by the defendant, and the judgment will be reversed and new trial awarded.

Judgment reversed.

MAYOR V. MUSGRAVE

(48 Md. 272.)

Municipal corporation — liability for abandonment of proposed improvement — agency.

A municipal corporation resolved upon a public improvement, and appointed commissioners to condemn property. The commissioners notified the plaintiff that his property was required, and that he must prepare to vacate it as soon as possible. He thereupon commenced closing out his business, and thus did only about half his ordinary business for six months and none at all for a year after that. The improvement was then abandoned. No compensation was ever paid or tendered him. *Held*, that he could not maintain an action of damages against the corporation for such voluntary and unnecessary acquiescence in a notification not within the powers of the commissioners.

ACTION of damages. The opinion states the case. The plaintiff had judgment below.

James A. Buchanan, for appellant.

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W. Hall Harris and *S. Teackle Wallis*, for appellee, cited *Baron v. Mayor, etc., of Balt.*, 2 Am. Jur. 210; *Stetson v. Faxon*, 19 Pick. 158; *Goodall v. The City of Milwaukee*, 5 Wis. 43; *Thayer v. Boston*, 19 Pick. 515, 516; *Leverich v. Mayor, etc., of New York*, 66 Barb. 623.

MILLER, J. A municipal corporation has the right to abandon any contemplated improvement, and repeal at its pleasure any ordinance providing for the same, and after such abandonment, property owners cannot compel the corporation to take and pay for property condemned for such purpose, nor does any action lie against the corporation for such abandonment merely. These propositions have been settled by many decisions of this court. *Graff v. Mayor, etc.*, 10 Md. 544; *McClellan v. Graves*, 19 id. 351; *Norris v. Mayor, etc.*, 44 id. 606. But the same authorities hold, that where the owner of property has suffered loss or damage by the acts or delay of the corporation in any such case, he is entitled to redress for the same, and that is the foundation of the action in the present case.

The plaintiff is the owner of a tannery on Jones' Falls, in the city of Baltimore, located between Front street and the stream, and between Gay and Hillen streets, and this establishment was within the lines prescribed for the improvement of Jones' Falls, by the 12th section of the ordinance on that subject of the 24th of April, 1872, and the record shows that on or about the 6th of January, 1873, the commissioners appointed under that ordinance came to his establishment with their clerk and janitor, and exhibited to him a map or drawing of the improvement, including his premises and notified him that they had condemned his property and would require possession of it at the earliest moment, as it was within that part of the section comprising it on which they desired to begin their work. They also further notified him that as from the nature of the tanning business, it would take him some time to work up his stock and close up his business so as to be able to give possession of his property to the city, he must so regulate his business as to bring it to a close at the earliest moment, and take in no new stock of bark or hides, but content himself with working out what he had on hand at the time, and one of the commissioners from time to time afterward urged the same thing upon him. This request or notice

was given, accepted and complied with in good faith, and was never countermanded. In consequence of it, and for no other reason, he at once commenced closing out his business, which he would otherwise have prosecuted as usual, and in thus closing out he did about half work for six months, and no work at all for about a year afterward until the latter part of April, 1874, when he made up his mind the improvement would not go on, and at once commenced making arrangements for procuring bark and resuming his work. It is for the loss and damage occasioned by this suspension of his business that he now sues, and it is obvious that his right to recover depends entirely upon the question whether it was within the scope of the authority vested in these commissioners to give the notice and make the demand or request referred to, for it is very clearly settled that one who contracts or deals with the agents or officers of a municipal corporation must *at his peril* take notice of the limits of their powers. *Mayor, etc., v. Eschbach*, 18 Md. 276; *Mayor, etc., v. Reynolds*, 20 id. 1; *Mayor, etc., v. Kirkley*, 29 id. 85; *Horn v. Mayor, etc.*, 30 id. 218. We must, therefore, examine the laws and ordinances relating to this improvement, and determine the extent of the powers and authority thereby vested in these commissioners.

After the great destruction of property in that vicinity occasioned by the flood of 1868, efforts were made to have the channel of this stream flowing through the city so changed, widened, straightened and improved as to prevent the recurrence of similar disasters. A plan for this improvement was made by Mr. Tyson, which was adopted by the mayor and city counsel, and ordinance No. 13 of 1870, approved January 31st of that year, was passed, appointing three named commissioners to carry it into effect. By ordinance No. 12, approved on the same day, provision was made for the issue of bonds of the city, not exceeding \$2,500,000, the proceeds of which were to be used in the construction of this improvement and for no other purpose. It was also provided that this ordinance should be submitted to a vote of the people for their approval or rejection, after the general assembly should have passed a law authorizing the issue of such bonds. The legislature, by the act of 1870, chapter 113, approved March 23, 1870, authorized the mayor and city council to issue bonds not exceeding \$2,500,000 for this purpose, provided ordinance No. 12, above mentioned, should be approved by the votes of a majority of the legal voters of the city.

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By another act, approved on the same day (Act of 1870, ch. 115), the mayor and city council were authorized and empowered to make such improvements in connection with Jones' Falls as in their judgment are desirable, and for this purpose to change the course, lines and boundaries of the stream in whole or in part, to lay out and construct streets, avenues and wharves on the sides of and adjacent to the same, to widen and deepen the channel, to construct such sewers and drains as may be requisite, "and generally to do all such things, and exercise all such powers as in their judgment shall be necessary to be done and exercised for the accomplishment of any plan or plans for the improvement of Jones' Falls, which have been or may be adopted by them." This law also gives them power to acquire property by condemnation, and ratifies all the provisions of ordinance No. 13, above referred to, in the same manner and to have the same effect as if that ordinance had been passed after the approval of this act. The bond ordinance was subsequently approved by the popular vote, but nothing was done in prosecution of the work under ordinance No. 13. In 1872 was passed ordinance No. 51, approved April 24th of that year, supplementary to ordinance No. 13 of 1870, and the commissioners appointed under this supplementary ordinance proceeded in the discharge of their duties and it was while acting under this ordinance that they gave the notice and made the demands respecting the plaintiff's property, which have resulted in the present suit. Its provisions we shall examine more at length presently. It is conceded that while it was originally estimated the entire cost of this improvement would not exceed \$2,500,000, yet the valuation of property alone to be taken for the work amounted to nearly that sum, and it was then estimated that the additional sum of \$1,500,000 would be required to complete it. An ordinance, approved February 12th, 1874, providing for the issuing of bonds for this additional sum, was submitted to the people for approval, but was rejected, and then by an ordinance, approved May 27, 1874, the ordinance of 1872 was repealed, and the improvement thereby authorized was abandoned.

Let us now examine this ordinance of 1872. It consists of twenty-two sections, and a general review of its main provisions is essential to an understanding of the powers it conferred upon the commissioners. It provides first for the appointment of three persons to be styled the "Board of Commissioners for the Improvement of Jones' Falls," fixes their salaries, prescribes their oath of

office, gives them power to appoint a clerk, who shall keep a full and true record of their proceedings, also a chief engineer, who shall act under their supervision, and discharge such duties as shall be prescribed by this ordinance or by the said board; and by section *seven* it is enacted, "that the said board of commissioners shall have, and they are hereby vested with, the general charge, superintendence and control of the execution of the plan for the improvement of Jones' Falls hereinafter mentioned and prescribed, and shall have all the powers necessary or proper to carry out said plan and accomplish the said improvement." The commissioners are then given full power and authority to make, award and settle the terms of all the contracts necessary for the construction of the works contemplated by this ordinance, and are authorized and directed to superintend the performance of the work by the contractors, and to annul their contracts if they fail faithfully and properly to perform them. Before awarding these contracts they are required to advertise for proposals and to award the same to the lowest competent and responsible bidder, and to so apportion them, as that the completion of the entire work shall be accomplished as soon as may be consistent with the proper execution of the same. All expenses of the board in the discharge of their duties, including their salaries, and all payments due on the contracts awarded by them, and all payments for land damages, are to be paid by the city register upon the warrant of the comptroller, who shall issue his warrant therefor upon the production to him of orders specifying the amounts respectively due, signed by the board or a majority of them, and the commissioners shall present to the mayor and city council quarterly reports giving detailed accounts of their proceedings and expenditures. By section *twelve* it was made their duty without delay, under the advice of their chief engineer, to establish and define the lines of the improvement from Eager street to the basin, to determine the heights and widths of the new walls, the depth of the excavations to be made, and to adopt detailed specifications of the entire work, *provided*, the width of the new channel between certain described points shall be according to certain specified details, and *provided*, further, that, in establishing the lines, and obtaining the width, and adopting the details aforesaid, the commissioners shall be governed by, and as nearly as possible conform to, certain general directions which the section specially prescribes. When these locations are thus made

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and these lines are thus established, they shall have made an accurate copy of the plat or drawings of the lines, and file the same in the office of the city commissioner, and the same shall be known and recognized, after all rights of property within the same shall have been acquired by the city, as the lines and boundaries of Jones' Falls. It is then made their duty to have erected certain described bridges, for which they are to award contracts in the same manner as for the construction of other parts of the work, also to provide in the same manner for the construction of sewers, and to make such changes in the grades of streets as may be necessary for the proper construction of the works hereinbefore provided for. They are then directed to have made such additional plats and surveys as may be requisite for the ascertainment of the damages consequent upon the condemnation or acquisition of property necessary to be acquired by the city in the location of these new lines, or such as may be damaged thereby ; and they shall then proceed to ascertain what actual damage will be caused to the owners of such property, and in making this estimate of damages they shall take into consideration the benefits, if any, which in their judgment will accrue to such owners, and if in any case part of a lot or house only is required and the owner shall claim compensation for the whole, they shall ascertain the value of the whole, and sell what is not needed. After completion of this valuation, including the value of all property necessary to be acquired by the city for the construction of these works, they shall cause statements thereof to be made, which in connection with an explanatory map, shall contain a correct description of each parcel of property to be taken, and the amount of damages awarded by them to each owner. They shall then give notice by publication that such statements have been prepared and are ready for examination by parties interested, and that they will meet to review their several ascertainment of damages to which any interested party may file written exceptions ; and on the hearing of such exceptions, they shall take testimony and make such corrections in their estimates as to them shall appear just and proper. After such corrections have been made, they shall cause these statements and maps to be copied, certified and deposited in the office of the city register, and shall then give notice of the right of appeal. Provision is then made for such appeals to the city court, and for a jury trial. In cases where no appeal is taken the assessments of the commissioners are made con-

clusive. Finally, upon payment or tender of the sums so ascertained by the commissioners, or by the court on appeal, to the parties entitled, or upon the investment thereof in five per cent city stock, such property shall become the property of the city for the purposes aforesaid.

Such are the powers conferred on these commissioners, and such are the duties they were required by this ordinance to perform. It cannot be successfully contended that the ordinance itself is in any respect in excess of the powers granted to the city by the act of 1870, ch. 115. But does the ordinance give these commissioners the authority to notify a property owner before his property is actually paid for under the condemnation, to close out his business and prepare to deliver possession, so as to bind the city for any loss accruing to him by reason of his obeying such notice and demand? The authority to do so is rested mainly upon the general terms of section *seven*, by which the commissioners are vested with the general charge, superintendence and control of the execution of the plan for the improvement hereinbefore mentioned and prescribed, and which declares they shall have "all the powers necessary and proper to carry out said plan and accomplish the said improvement." The terms here employed, it must be admitted, are very broad and general, but it must be remembered that language, however general in its form, when used in connection with a particular subject-matter, will be presumed to be used in subordination to that matter, and is therefore to be construed and limited accordingly. This is the rule of interpretation that is universally applied to instruments, whether formal or informal, creating agencies between private individuals. Story on Agency, §§ 21, 62, 68, 69. It is also a universal principle of the law of agency that the powers of the agent are to be exercised for the benefit of the principal only, and not of the agent or third parties. Hence a power in the most general terms to draw and indorse bills for, and in the name of the principal, will not authorize a drawing or indorsing in his name for the accommodation of third persons, or for the benefit of the agent. *Adams Express Co. v. Trego*, 35 Md. 67. It must also be noted that there is a broad distinction between the acts of an officer or agent of a public municipal corporation, and those of an agent for a private individual. In cases of public agents the government or other public authority is not bound unless it *manifestly appears* that the agent is acting *within the scope of his authority*, or he is held out

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as having authority to do this act, or is employed in his capacity as a public agent to make the declaration or representation for the government. Story on Agency, § 307 *a*. This rule was adopted and applied by this court in the cases of *Mayor v. Eschbach* and *Mayor v. Reynolds*, and the reasons for it stated. These are founded in public policy, and the rule indeed seems indispensable "in order to guard the public against losses and injuries arising from the fraud, or mistake, or rashness and indiscretion of their agents." In the case before us there is an entire absence of even a pretense of fraud or collusion, and it is conceded the commissioners, as well as the plaintiff, acted with the utmost good faith, but this cannot affect the principle on which the rule is founded, or prevent its application. Our predecessors have adopted, in *Reynolds'* case, the language of the Supreme Court in *Lee v. Munroe*, 7 Cranch, 370, where it is said "it is better that an individual should now and then suffer by such mistakes than to introduce a rule, against an *abuse of which*, by improper collusions, it would be very difficult for the public to protect itself."

In the light of these well-settled principles and rules of construction, we are unable to say that the authority insisted on is conveyed by the general language of this section. The mode of condemning property and of assessing and settling the damages is specially pointed out, and the duties of the commissioners in that respect are plainly defined. We cannot suppose that it was the intention of those who enacted this ordinance that the commissioners should have power to enter into any arrangements, or contracts with, or do any acts toward property-owners by which any other claim for damages could accrue to them than for the sums so to be ascertained and settled. Was it contemplated that every property owner, doing business in that locality, might have two sets of claims against the city, one for the value of his property ascertained by the condemnation, and the other for leaving it, or quitting his business upon preliminary notice, given by the commissioners? It is clear beyond question, that no property-owner could be deprived of the use or possession of his property, until he had been paid for it, or tendered the sum ascertained by the commissioners, or by a jury on appeal, and it follows that he was not bound to obey any notice to quit or to close out his business, given by the commissioners before such payment or tender had been made. It is equally clear, that upon such payment or tender

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the city could immediately take possession and oust the owner, no matter what might be the condition of his property or the state of his business. A power, therefore, the exercise of which, so far as we can see, results in no practical benefit to the city, a power which could not be enforced, and need not be obeyed, we cannot regard as "necessary or proper" to carry out the plan and accomplish the improvement contemplated and provided for by this ordinance. No other part of the ordinance professes to grant any such power, and in our judgment, the commissioners, in giving this notice and making this demand, exceeded the authority conferred upon them, and the city is therefore not responsible for the damages which resulted to the plaintiff from his voluntary acquiescence therein. It follows there was error in granting the plaintiff's prayer.

It appears from the record, that the notice was given on the 6th of January, 1873, before any formal condemnation of the property had been made. That condemnation, and the fixing of the value of the property by the commissioners, was not completed until the 15th of the following August. The plaintiff acquiesced in the assessment made by the commissioners, but other parties appealed, and all of these appeals had not been finally disposed of, before the ordinance was repealed. There was, hence, no such unauthorized *delay* on the part of the city, in abandoning the work as would give the plaintiff a cause of action on that ground, within the doctrine settled in the case of *Norris v. The Mayor*. Finding, therefore, in the record, no ground upon which the action can be sustained, we shall reverse the judgment without awarding a new trial.

Judgment reversed, and new trial refused.

JONES V. JONES.

(43 Md. 391.)

Marriage — evidence — presumption of — when overcome.

The presumption of a marriage between A and B, founded simply upon habit and repute, is overcome by proof of a subsequent actual marriage between A and C during the life-time of B.

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ISSUE of legitimacy from the Orphans' Court. The opinion sufficiently indicates the point.

Bernard Carter, for appellant.

Julian I. Alexander, for appellees.

MILLER, J. When this case was last before this court* it was decided that if Andrew D. Jones was *in fact* married either to Anne Smith or Frances Moore, during the life of Hennie, the mother of the appellant, Henry Jones, all mere presumption of a *previous* marriage of Andrew with Hennie, founded simply upon habit and repute, is at once overthrown, and it then becomes incumbent upon the appellant to establish the alleged marriage of his mother with Andrew as an actual fact by more direct proof. 45 Md. 159. The reasoning upon which this decision rests is that in such a case the presumption of a marriage arising from cohabitation and repute is met and overcome by the stronger presumption that a man will not incur the guilt of felony and the danger which attends it by marrying another woman during the life of one to whom he had previously been lawfully married.

The appellant's counsel has earnestly insisted that the authorities are at war with this position, and sustain the doctrine that the presumption arising from habit and repute alone may be relied on, and is sufficient to establish a lawful marriage in *all cases*, save criminal prosecutions for bigamy or adultery, and actions of *crim. con.*, which are penal in their nature. We think, however, that the ground taken in our former decision is well supported by authority and well founded in reason. It is not strange that but few cases can be found in the books in which this precise question has arisen or been adjudicated. The decisions, however, of the Court of Queen's Bench, of Upper Canada, if correctly stated, as we presume they are, in 1 Bishop on Mar. & Div., § 444, are directly in point and seem to have been well considered. The case of *Taylor v. Taylor*, where two women severally claimed administration of the effects of a deceased as being his widow, was twice before the Ecclesiastical Court in England, and in the first instance the court said there must be "strict proof" of the alleged antecedent marriage, and that "presumption could not by law be made

* 45 Md. 144.

in favor of it" (1 Lee, 571, in 5 Eng. Ecc. Rep. 454), and in the second, "cohabitation alone, which only creates a presumption of marriage, is not sufficient to set aside an actual fact of marriage." Again, in *King v. Inhabitants of Twynning*, 2 B. & Ald. 386, we find a very strong instance in which the presumption of innocence was held to prevail over another presumption. The case involved simply the settlement of a pauper. A woman had been married to a soldier, who soon after left for the East Indies. Within twelve months the woman married again, and the question turned upon the validity of the second marriage, and it was sustained. BAILEY, J., said, "The facts of the case are that there is a marriage of the pauper with Francis Burns, which is *prima facie* valid, but the year before that took place she was the wife of Richard Winter, and if he was alive at the time of the second marriage, it was illegal and she was guilty of bigamy. But are we to presume that Winter was then alive? If the pauper had been indicted for bigamy, it clearly would not be sufficient. In that case Winter must have been proved to have been alive at the time of the second marriage. It is contended that his *death* ought to have been proved, but the answer is that the *presumption of law* is, that he was *not alive* when the consequence of his being so is, that *another person has committed a criminal act*;" and BEST, J., said, "Where these conflicting presumptions exist, I think the sessions were warranted in presuming the death of the first husband, on the ground that they could not presume that the woman had committed bigamy." These decisions in England and Canada sustain, in our judgment, the position we have taken on this subject. In this country it must be admitted there is some conflict of decisions, and of judicial opinion; but it cannot, we think, be said that the preponderance of authority is the other way. In *Poultney v. Fairhaven*, Brayton, 185, which was also a pauper case, the question was whether the pauper woman Asenath was the wife of John Slyter, who swore he was lawfully married to her. To invalidate this marriage the offer was first to prove by Asenath herself, that previous to the time when it was alleged she had married Slyter she was lawfully married to one Austin, who is now alive, but this testimony was rejected. The offer was then made to prove her marriage with Austin, by reputation and cohabitation with him as his wife, and that Austin was yet alive, but this testimony was also rejected. On appeal the point was distinctly presented by counsel that evidence of her marriage with Austin by

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reputation ought to have been received, as it is admissible testimony in all cases except prosecutions for bigamy and actions of *crim. con.*, but the court said "she being *prima facie* the wife of Slyter, it was necessary a previous *legal* marriage should be proved to show she was not his *legal* wife ; cohabitation with Austin, though sufficient to charge him, was not proper evidence to *disprove* her the wife of Slyter." In *Senser v. Bower*, 1 Penn. 450, which was an action of ejectment, it was said by GIBSON, C. J., delivering the opinion of the court, "For civil purposes, reputation and cohabitation are sufficient evidence of marriage ; and there is evidently enough in the case to show that the plaintiff's father and mother were married in fact. But there is said to be the same evidence of a precedent marriage of the mother with another man, who was alive at her second marriage ; and hence a supposed dilemma. But the proof being equal, the presumption is in favor of innocence, and so far is this carried in the case of conflicting presumptions, that the one in favor of innocence shall prevail. It must be admitted that this principle is not immediately applicable here, inasmuch as there is no conflicting evidence, and the facts supposed to result are consistent with each other ; but it establishes that the same proof that is sufficient to raise a presumption of innocence may be inadequate to a presumption of guilt." It may be said this is a mere *dictum*, but if so, it certainly is the *dictum* of a very eminent judge, expressing the opinion of a very able court, and is entitled to due weight as such. In *Clayton v. Wardell* there was a contest over a share of a residuary estate, devised to the testator's lawful issue, and the question turned upon the legitimacy of the claimant. When the case was before the Supreme Court (5 Barb. 214), that court, by EDWARDS, J., delivered a very able opinion, holding that where there is evidence of an actual marriage, and the question is as to the legitimacy of a child of such marriage, the marriage will not be rendered illegal, nor the issue of it declared illegitimate by proof of a prior marriage arising from cohabitation, reputation and the acknowledgment of the parties, and this is placed on the ground that proof of actual marriage is necessary to overcome the presumption which the law makes against crime or acts of a criminal nature. When the case came before the Court of Appeals (4 Comst. 230), a majority of the judges, while declining to adopt the position assumed by the Supreme Court, seem to have rested their actual decision of the case upon the ground that the proof

was not sufficient to establish the first alleged marriage, even if there had been no second actual marriage ; but one of them, PRATT, J., delivered a very vigorous opinion, taking the same position as that taken by the Supreme Court. This case was much relied on by the appellant's counsel as sustaining his position, but it is cited by Mr. Bishop in section 446 of his book upon Marriage and Divorce, as a seeming authority the other way. In the case of *Jewell v. Jewell*, 1 How. 219, the question most discussed by counsel appears to have been whether by the laws of Georgia and South Carolina, a contract made *per verba de presenti*, without cohabitation or *per verba de futuro*, and followed by consummation, amounts to a valid marriage, and equally binding as if made in *facie ecclesie* ; and on this question the judges of the Supreme Court were equally divided in opinion. A contract of this character followed by cohabitation for many years, and the birth of eight children, was relied on in that case to establish the first alleged marriage, notwithstanding a subsequent ceremonial marriage duly proved while the first husband was living. It must be conceded, however, that what was said by the court upon the other points of the case, as to the admissibility of the acts and declarations of the parties during this long cohabitation, and that they lived together for so many years as man and wife, and treated and spoke of each other as such, to show that there had been an actual antecedent marriage between them, tends to support the contention of the appellant's counsel, that evidence of habit and repute ought to have been admitted in this case. He has also cited for the same purpose and with equal success, the North Carolina case of *Archer v. Haithcock*, 6 Jones' L. 421, and the Kentucky case of *Donnelly v. Donnelly*, 8 B. Monr. 113; but both these cases are referred to by Mr. Bishop, in §§ 443 and 445, as at variance, as he believes, with the general English and American doctrine. One of the questions decided by the Supreme Court in the case of *Gaines v. Relf*, 12 How. 472, was that an actual ceremonial marriage could not be made void by the mere confession or declaration of one of the parties to it, that he had another wife living at the time ; and in disposing of this point the court said : "The great basis of human society throughout the civilized world is founded on marriages and legitimate offspring ; and to hold that either of the parties could by a mere declaration establish the fact that a marriage was void would be an alarming doctrine." Finally, in the more recent case of *Myatt v. Myatt*, 44 Ill. 473, where there

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was a proceeding to revoke letters of administration, which had been issued to the widow of a deceased party, on the ground that at the time of her marriage with the deceased, she had another husband living, it was held by the court, BREKSE, C. J., delivering the opinion, that the proof of such former marriage, consisting simply of general report to that effect, and of the fact of cohabitation together as husband and wife, with one or more children born to them, is not sufficient to establish it.

We have thus at some length reviewed the authorities bearing on this question, and in view of them, and also, in view of our previous decision in *Denison v. Denison*, 35 Md. 361, as to what constitutes a legal marriage in this State, and of what we have said in *Barnum v. Barnum*, 42 Md. 295, that in ordinary cases where reputation is relied on to raise the presumption of marriage, it must be founded on general, and not divided or singular opinion, we have no hesitation in adhering to our former decision in this case. While doing so, we accept and reaffirm the general doctrine, that if parties live together ostensibly as man and wife, demeaning themselves toward each other as such, and especially if they are received into society and treated by their friends and relations as having and being entitled to that status, the law will, in favor of morality and decency, presume that they have been legally married. But what we do decide is that as in such cases a legal marriage is only presumed from general repute and habit, that presumption has its limits and may be overcome in particular cases by counter-evidence or counter-presumption; and in a case like this, where the presumption of a lawful marriage founded simply upon habit and repute is met by the counter-presumption of innocence, the former must give way, and the law then requires that the first alleged marriage as an actual fact shall be established by more direct proof.

It therefore only remains for us to inquire whether more direct proof on this subject has been supplied in the present trial, and is to be found in the present record. Only two additional witnesses have been produced on the part of the appellant, and they merely prove that Andrew and Hennie were considered as man and wife by Capt. Frazier and his sons, and by their acquaintances white and colored, and that Hennie called herself Andrew's wife, but never in Andrew's presence. This is but a very slight addition to the previous evidence of general repute. In no sense does it constitute the more direct proof which we have said the law requires, and the

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Superior Court was quite right in so treating it. All the rulings of that court at the present trial are in entire accord with what we have decided to be the law of the case, and they must be affirmed.

Rulings affirmed and cause remanded.

LAFIN AND RAND POWDER COMPANY V. SINSHEIMER.

(48 Md. 411.)

Negotiable instruments — acceptance, whether individual or official — evidence to show.

A bill was drawn by a corporation, addressed to its treasurer as an individual and accepted by him with the addition of "treasurer," etc. *Held*, that parol evidence was admissible to show that his acceptance was designed only in his official capacity.

In a suit by payee against acceptor, the former is in the position of a *bona fide* indorser, and the consideration cannot be inquired into.

ACTION on a bill of exchange. The court instructed the jury in accordance with defendant's third prayer, that "if the jury shall find that the plaintiff sold to the Lancaster Furnace and Mining Company the powder stated in the evidence, and delivered the same, to be paid for by said company, and that afterward the defendant gave the acceptance sued on for the price of the same, then there is no sufficient evidence to bind him individually under the statute of frauds, and the plaintiff is not entitled to recover." The other facts appear in the opinion. The defendant had judgment below.

John Scott, Jr., for appellant.

I. Rayner, for appellee.

ROBINSON, J. The appellant sued the appellee, as acceptor of the following bill of exchange :

"\$728.00.

IRONTOWN, Nov. 18th, 1874.

Sixty days after sight, pay to the order of Lafin & Rand Powder Co. seven hundred and twenty-eight dollars, value received, and charge to account of

LANCASTER FURNACE AND M. Co.,

To L. SINSHEIMER,

per S. J. A., Jan. 20.

Baltimore."

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Written across its face, "Nov. 20, 1874, accepted. L. Sinsheimer, Treas. L. F. and Mining Co."

It is insisted that the bill on its face imports a personal liability of the appellee as acceptor ; and that parol evidence is inadmissible either to prove that it was accepted by him in his official character as treasurer of the corporation, and for a debt due by it to the plaintiff, or to prove other facts and circumstances with a view of determining the personal liability of the appellee.

The construction of written instruments, signed by persons describing themselves as agents, or as officers of corporations, has been a fruitful source of litigation, and the decisions are conflicting and in many cases unsatisfactory. Not that there seems to be any difficulty in regard to the rules of law, which ought to govern in the interpretation of contracts, but in the application of such rules to each particular case. The subject is fully considered by Parsons on Notes and Bills, Story on Promissory Notes, Byles on Bills of Exchange ; and we do not propose to examine in detail the many cases referred to by these writers, nor attempt the fruitless task of reconciling conflicting decisions.

After all, the question whether one signing a note or accepting a bill, as an officer of a corporation, means to bind himself personally, is a question of intention between the parties to the instrument ; and this intention, we admit, as a general rule, must be determined by the face of the paper itself. Where one having authority accepts a bill in such a manner as manifests an intention not to bind himself, but to bind a corporation of which he is an officer, and to be paid out of the funds of the corporation, it is clear in such a case, the acceptance will not bind him personally.

But cases frequently occur, owing to the almost infinite variety in forms of expression and in the use of words, in which it is difficult to determine from the face of the paper itself, whether the party signing means to bind himself, and adds his official character merely for the purpose of indicating the character in which he acts ; or whether the official character is added for the purpose of showing he does a mere ministerial act ; and that the promise made and the obligation incurred for and in behalf of the corporation. In other words, does he in the language of the court in *Bradlee v. Boston Glass Co.*, 16 Pick. 347 : "Apply the executing hand as the instrument of another ; or the promising and engaging mind of a contracting party." In such cases where there is such ambiguity on the

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face of the paper as to be consistent with either construction, whether one means to bind himself personally, or acts only in an official capacity, parol evidence is clearly admissible, to prove the circumstances under which the contract was made ; or, in other words, to prove the true nature of the transaction. *Haile et al. v. Peirce*, 32 Md. 330 ; 1 Am. Lead. Cas. marg. 633, notes to *Rathbon v. Budling* and *Pentz v. Stanton*.

Parol evidence in such cases does not contradict, alter or add to the written instrument, but explains the intention of the parties, and which could not be ascertained with any degree of certainty from the face of the instrument itself.

The question then in this case is whether there is any such ambiguity on the face of this bill and acceptance, as to make parol evidence admissible to prove the circumstances under which it was accepted. Here is a bill of exchange, drawn by a corporation on the appellee in his individual capacity, to pay a certain sum of money to the appellant. It is returned accepted by him as treasurer of the Lancaster Furnace and Mining Company.

Now if it had been drawn on him as treasurer, and so accepted, it certainly might be contended that the acceptance did not bind him personally.

But it is said having been drawn on him *individually*, he was bound to accept according to the tenor of the bill, or disclaim all personal liability by his acceptance. To this, however, it may be replied, that it was in the power of the appellant, as payee, to insist upon an absolute and unqualified acceptance, and upon the refusal of the appellee so to accept, or upon a qualified or conditional acceptance, to have notified the drawer accordingly.

Be that as it may, no one can read this bill and acceptance and say that it necessarily or even clearly imports an agreement on the part of the acceptor to be individually liable, and if it be conceded that it is liable to such a construction, it is equally clear it may be construed as an acceptance by the appellee in his official character, as treasurer of the corporation. Being consistent therefore with either construction, parol evidence was admissible to prove the circumstances surrounding the transaction for the purpose of enabling the court and jury to determine the respective liabilities of the parties.

In *Mare v. Charles*, 5 Ell. & Black. 978, it does not appear that parol evidence was offered to explain the character of the accept-

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ance, and the acceptor was held liable on the ground that where the words of an instrument will reasonably bear an interpretation making it valid, courts will not so construe it as to make it void. Or as put by COLERIDGE, J., in that case, it ought to be construed "*ut res magis valeat*," and not "*ut res magis pereat*."

But where the acceptance is so worded as to be ambiguous or susceptible of different constructions, the introduction of parol evidence to explain this ambiguity and the circumstances under which the acceptance was made, does not necessarily render either the acceptance or the bill itself void. The object of the proof in such cases is to determine the question of the personal liability of the acceptor.

The evidence therefore offered in this case being admissible, if it established the fact that the bill was drawn for materials furnished the Lancaster Furnace and Mining Company, and the appellee was authorized, and did in fact accept it as treasurer of the corporation, and it was understood between the payee, plaintiff below, and the acceptor, that the latter was not to be liable personally, then the plaintiff was not entitled to recover, and there was no error in granting defendant's first prayer.

The defendant's third prayer, however, was clearly erroneous. The statute of frauds has no application in suits on an acceptance, which as against the payee conclusively admits funds of the drawer to be in hand. The drawer and acceptor are the *immediate* parties to the consideration, and if the acceptance be without consideration, the drawer cannot recover of the acceptor. But the payee holds a different relation; he is a stranger to the transaction between the drawer and the acceptor, and is therefore in a legal sense a *remote party*. In a suit by him against the acceptor, the question as to the consideration between the drawer and acceptor cannot be inquired into. The payee or holder gives value to the drawer, and if he is ignorant of the equities between the drawer and acceptor, he is in the position of a *bona fide indorsee*. *Robinson v. Reynolds*, 2 Q. B. 196; *Raborg v. Peyton*, 2 Wheat. 385; *Storer v. Logan*, 9 Mass. 60.

For these reasons the judgment below must be reversed and a new trial awarded.

Judgment reversed, and new trial awarded.

PEOPLE'S BANK V. SHRYOCK.

(48 Md. 437.)

Partnership — attachment of debt due to, at suit of creditor of individual partners.

A debt due an existing partnership, whose affairs are unsettled, is not subject to attachment at the suit of a creditor of one of the partners.

ATTACHMENT. The opinion states the case. The plaintiff had judgment below.

John K. Cowen, for appellant.

J. D. Lipscomb and *Henry D. Loney*, for appellees. The fund in the hands of the garnishee was the property of the partners according to their respective interests in the firm, and as such, is liable to execution by way of attachment, for the debt of an individual partner. *Wallace v. Patterson*, 2 H. & McH. 463; *McCarty v. Emlen*, 2 Dall. 277; *Chapman v. Coops*, 3 B. & P. 289; *Parker v. Pistor*, 3 id. 288.

BRENT, J. The appellees, having obtained a judgment against *William H. Trego*, issued upon it an attachment by way of execution. This attachment was laid in the hands of the People's Bank of Baltimore, to bind the interest of the defendant, Trego, in a sum of money standing upon the books of the bank to the credit of the firm of Trego & Kirkland, of which firm Trego was a partner.

The question then arises, is a debt due to a co-partnership liable to attachment at the suit of a creditor of one of the partners?

If the attachment had been laid upon the tangible effects of the firm, there would be no doubt of the right to do so, for all the authorities concur that the property of a firm may be sold for the debt of one of the partners. When sold the vendee purchases and is substituted to nothing more than the interest of the partner, which afterward becomes the subject of ascertainment by a proper adjustment of the respective interests of the partners. The rights of co-partners and creditors of the firm are not thereby sacrificed or disturbed. But when a debt is the subject of attachment, the judgment, if obtained against the garnishee, changes the right to

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the fund without any settlement of partnership accounts, and vests in the attaching creditor an absolute claim to the payment over to him of so much money. In *Drake on Attachment*, § 567, the author says, "The attachment of a debt due to a co-partnership, in an action against one of the partners, is justly distinguishable from the seizure on attachment or execution of tangible effects of the firm for the same purpose." He refers to the case of *Winston v. Ewing*, 1 Ala. 129, and this case is a very strong one upon the question now presented for our decision. There it was sought to subject the debt due to a firm to an attachment issued against one of the partners. The court held that this could not be done. The property of the partnership, it was conceded, was liable to execution and sale for the separate debt of a partner, the vendee under such sale becoming tenant in common with the other partner. But it was otherwise held in regard to a debt due. The court says, "it has been expressly adjudged that the interest of one partner in a debt due to the partnership cannot be subjected by process of attachment, to the satisfaction of the separate debt of that partner, without showing from the state of the partnership accounts, as between the partners and with reference to the indebtedness of the partnership, what the right or interest claimed amounts to." The authorities cited are *Fisk v. Herrick*, 6 Mass. 271; *Lyndon v. Gorham*, 1 Gall. 367; *Church v. Knox*, 2 Conn. 514, and *Brewster v. Hummett*, 4 id. 540, and they conclusively show that an attachment like the present would not be maintained in the courts of either Massachusetts or Connecticut. In *Lyndon v. Gorham*, 1 Gall. 367, decided by Judge STORY, that learned judge says, "In order to adjudge the trustee responsible in this suit, it must be decided that the funds of one partnership may be applied to the payment of the debts of another partnership, upon the mere proof that the principal debtor has an interest in each firm. If this be correct, it will follow that a *separate creditor of one partner will have greater equitable as well as legal rights than the partner himself has*. The general rule undoubtedly is, that the interest of each partner in the *partnership funds* is only what remains after the partnership accounts are taken; and unless upon such an account the partner be a creditor of the fund, he is entitled to nothing. In *Johnson v. King*, 6 Humph. 233, it is said: "The question in this case is whether an execution creditor of one member of a partnership is entitled to a judgment in a garnishment

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proceeding against a debtor to such partnership. This question we decide in the negative. Such debt belongs to and is assets of the partnership, primarily liable to the satisfaction of partnership debts. If a judgment were given at law, upon the garnishment proceeding against the debtor to the partnership, to satisfy the separate liability of one of the partners, it would unjustly abstract a portion of the fund primarily belonging to the objects and purposes and creditors of the concern. And in such garnishment nothing can be done but to give or refuse the judgment. The court has no power to impound the debt until by the adjustment of all the partnership affairs it shall appear whether the separate debtor of the execution creditor has any and what interest in the general surplus, or in the particular debt so impounded. Such proceedings cannot take place at law."

We have quoted at length from this case because the views there expressed seem to be specially appropriate to the case before us. The proceeding of attachment in this State is essentially a legal proceeding and in no way appropriate to ascertain and settle the equitable rights between the garnishee and defendant, or to ascertain by adjusting the partnership affairs the true interest of the defendant in the fund attached. The only judgment which could be given against the garnishee would be for a proportion of the money due the partnership—that proportion to be measured by the number of the members composing the firm—the amount due the attaching creditor. This would certainly be against the weight of authorities in this country, and in most cases productive of the greatest injustice.

In the cases of *Sheedy v. The Second National Bank, Garn.*, 62 Mo. 18; s. c., 21 Am. Rep. 407; and *Myers v. Smith*, 29 Ohio St. 120, both decided in 1876, it was held that partnership demands cannot be garnished for the separate debt of one of the partners. And to the same effect are the decisions in Vermont, New Hampshire, New York, Louisiana and Mississippi. See Drake on Attachment (4th ed.), § 570 and notes. The exception to this rule is, where equity powers have been conferred by statute upon the common-law courts, and when by virtue of such powers they can compel a settlement of the partnership for the purpose of ascertaining whether one of the partners has such an interest in a particular debt due the firm as to justify its appropriation to the payment of his individual indebtedness. As no such powers have

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been conferred upon the common-law courts of this State, the exception cannot be applied to an attachment here.

The only cases in this country in which it is claimed a contrary doctrine is held, and to which we have been referred, are the cases of *McCarty v. Emlen*, 2 Dall. 277; *Knox v. Schepler*, 2 Hill, 595, and *Wallace v. Patterson*, 2 H. & McH. 463. The case of *McCarty v. Emlen* is a very old one, having been decided in 1797. If it has not been expressly overruled, it certainly has been very much shaken by the case of *Knerr v. Hoffman*, 65 Penn. St. 126, in which the opinion of the court was delivered by Judge SHARSWOOD. So much so that the doctrine it announces can hardly be considered as the present recognized doctrine of the courts of Pennsylvania. And in this view we think we are strengthened by what is said by Judge AGNEW in the case of *Alter v. Brooks*, 9 Phila. 258. But apart from this, the doctrine announced in that case does not recommend itself to our judgment, and we are not disposed to adopt it. The case of *Knox v. Schepler*, 2 Hill, like the case in *Berry v. Harris*, 22 Md. 30, is one where the defendant was the sole surviving partner of the firm of Gable, Cowell & Schepler. It therefore rested upon a different principle from the case before us, in which the partnership is a *continuing* one at the time of the attachment. It is, however, said in the opinion of the court "that the interest of one partner may be taken in execution or may be the subject of attachment at the suit of a separate creditor of that partner." But the rule laid down in regard to the disposition of the fund after judgment of condemnation shows that under the law, as recognized in South Carolina, the case is brought at least within the equity of the exception to which we have above alluded. The judgment of the court was that the money should be paid over *conditionally* to the attaching creditor,—that is, it was "to be held by him as the defendant had it, subject to the equities of the other partners and of the creditors of the firm," and was also to give bond "to answer any claim which might thereafter be made on such fund." We are not disposed to quarrel with this rule, but cannot assent to hold it applicable to our courts. The language of SWIFT, C. J., in his opinion in *Church v. Knox*, 2 Conn., is very appropriate to it. He observes, on page 518, "It is further said, if the plaintiffs have recovered more than the proportion of the defendant in this debt, and it should be wanted for the payment of partnership debts, the other partners

may call them to account, and recover back such money. At this rate a judgment may be rendered in favor of a man for a sum certain, with a liability to refund the whole, or a part of it, on some contingency. It is sufficient to state the proposition to show the absurdity of it. What right can a court have to say, that a certain part of a debt due to a partnership may be taken to pay the private debt of a partner in a suit where the partners are not parties; and then, if wanted to pay the debts of the partnership, to oblige them to resort to the creditor?"

But the case of *Wallace v. Patterson*, 2 H. & McH. 463, is relied upon to sustain this attachment. It is to be said of that case which was decided as far back as 1792, that no opinion of the court was filed in it, and it is impossible from the report of the case to ascertain the true ground upon which the judgment was given. The case is altogether too unsatisfactory to be adopted as a binding authority. In the case of *Berry v. Harris*, 22 Md. 30, the point was made, that the separate creditor of one partner can attach a debt due the partnership, and the case of *Wallace v. Patterson* was cited in support of the proposition. Although this case was decided upon the ground that the defendant was a surviving partner, and that by virtue of his survivorship the legal interest in the debt attached was absolutely transferred to him and therefore liable to be attached for his separate debt, the general proposition contended for was noticed. And the court then intimated in the strongest manner, that the case of *Wallace v. Patterson* would not be considered a binding authority for the point to which it was cited. On page 40, Judge BOWIE, who delivered the opinion of the court, uses this language, "If this was a case of continuing partnership, we should have much difficulty in distinguishing it on principle from the case of *Fisk and another v. Herrick*, 6 Mass. 271; *Lyndon v. Gorham*, 1 Gall. 367, and the cases in Alabama and Tennessee, but the case of a surviving partner, invested with the entire legal property, and control over the chattel, so broadly marks the line between them, that we are not at liberty to disregard the legal claims of the attaching creditor. The case of *Wallace v. Patterson*, 2 H. & McH. 463, was the case of a domestic creditor, against one of the several non-resident partners, whose firm as well as the debtor partner had become bankrupt. The distinction between attachments against tangible chattels and *choses in action* belonging to the firm, and attachments issued during the existence of the firm, and after its

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dissolution, was not adverted to, and no opinion was given ; we do not regard it therefore as decisive of the point to which it was cited."

So satisfied are we upon the ground of reason and expediency, and the great weight of authority that the partnership credits of a continuing partnership should not be subjected to the process of attachment at the suit of a separate creditor of one of the partners, that we cannot adopt the case of *Wallace v. Patterson* to the extent which is claimed for it.

In our opinion then, in a case like the present where the partnership is a continuing one, and where there has been no adjustment of partnership affairs, a debt due the partnership cannot be taken by garnishment to pay the individual debt of one of the members of the firm.

This judgment will therefore be reversed and judgment entered for the appellant.

Judgment reversed.

FAWSETT V. CLARK.

(48 Md. 494.)

Slander and libel — evidence to show sense in which words were intended.

In an action of slander, evidence is admissible to show that words apparently actionable in themselves were not used in an actionable sense.

ACTION of slander. The defendant offered the following prayers: 3. If the jury believe, from the evidence, that the alleged slanderous words were uttered by the defendant as alleged, but were so uttered solely in reference to the plaintiff's conduct in writing the letter to Doty, spoken of in the evidence, and were not intended to, and were not understood by the bystanders, to charge the plaintiff with having committed a felony, or other crime punishable corporally, then the plaintiff is not entitled to recover.

4. If the jury believe that the defendant uttered the words, "confidence man," in reference to the plaintiff, meaning thereby to impute to plaintiff the commission of no crime or felony, and that said words were meant and understood to charge the plaintiff with being a man who abused one's confidence after obtaining it,

by professing to be a friend, then the plaintiff cannot recover for the utterance of said words in this action. These were refused. The plaintiff had judgment.

William Rowland, for appellant.

John S. Tyson, for appellee. The defendant's fourth prayer was rightly rejected. 1st. Because it is based upon the mere belief of the jury, and not upon their belief from the evidence. 2d. There is no evidence to support it. 3d. It only leaves to the jury to find that the defendant *meant* to impute no crime, but does not require them to find that he was *understood* by the bystanders to impute no crime; for although it requires the jury to believe "that said words were meant and *understood* to charge the plaintiff with being a man who abused one's confidence," etc., the words might have been so understood, and also understood to impute a crime. For a "confidence man" is indeed one who abuses confidence, etc., and thereby obtains money or goods under false pretenses. Besides, the prayer leaves it to the jury to believe *how* the words were understood, without saying *by whom* they were so understood. The words "confidence man" have acquired a definite meaning; require no innuendo, nor any evidence to show how they were understood by the bystanders, especially in *connection* with the word "thief." *Woolnoth v. Meadows*, 5 East, 463; *Roberts v. Camden*, 9 id. 93; *Garrett v. Dickerson*, 19 Md. 447-8.

BOWIE, J. The appellee in this case sued the appellant in the Superior Court of Baltimore city, in an action for slander.

The *nar.* contained three counts; the first charged the defendant with falsely and maliciously saying of the plaintiff, "*You are a thief.*" The second count alleged, the defendant falsely and maliciously published of the plaintiff the words following, viz.: "You are no better than a thief." And the third count charged, that the defendant intending to injure the plaintiff in his good name, etc., falsely and maliciously spoke and published of the plaintiff, the words following, that is to say, "*You are a confidence man,*" thereby, and then and there meaning that he, the plaintiff, had been and was guilty of obtaining by false pretense from some other person some chattel, etc., with intent to defraud such person. The defendant pleaded "*non cul.*"

Fawsett v. Clark.

At the trial the plaintiff, to maintain the issue joined on his part, testified in his own behalf that he was a cattle dealer at Calverton Drove Yards; that in the spring of 1875, Messrs. Baugher & Redseeker, proprietors of the Calverton Drove Yards failed, and the plaintiff succeeded them in the fall of 1875; that he bought from Baugher, with defendant's approval, a quarter interest in two trotting horses, in which Fawsett had an interest, and had authority from Baugher to settle the earnings of the horses with Fawsett, who had the management of the horses; Fawsett gave a statement and plaintiff asked for an itemized account which Fawsett gave; which did not contain an item of \$100 for cash paid one Doty for driving; he then gave another account containing this item, and exceeding the former account by at least \$1,000 for the same period; the plaintiff then wrote to Doty to inquire if the charge of \$100 was correct, and also wrote to others. Doty sent plaintiff's letter to Fawsett. Witness further testified that on Tuesday, before the 24th May, 1876, it being market morning, a number of persons about, he was at Calverton Hotel when Fawsett came in, handed witness *Doty's letter* and asked witness if he had written it, and why; witness told him, "Because he had a right to do it;" Fawsett said, "that if he had been at home when he received the letter he would have cowhided witness;" "said I was a liar," "said I was a confidence man," "no better than a thief" — "yes, a thief," etc. Several other witnesses were called on the part of the plaintiff. John Winyard testified that he heard, on the occasion in question, Fawsett call Clark *a liar and a thief*, and said he would steal and rob.

On cross-examination he said, Fawsett had a letter, and asked him, Clark, if he wrote it; Fawsett said Clark had acted like a thief; he said *that in connection* with that letter.

S. D. Hawkins, in his examination-in-chief by plaintiff, testified "Fawsett walked over to Clark, showed him the letter; asked him if he had written it, said no gentleman would have written such a letter; told him that he was a "confidence man," "no better than a thief," said "he was a thief," or "no better than a thief."

Being cross-examined, this witness said, that the whole quarrel had reference to the letter. The substance of what Fawsett said to him was *you have charged me with making false accounts*.

The defendant was examined in his own behalf, and deposed substantially to the same facts, saying, "that the letter caused all that was said, there was no other trouble between them."

The appellant offered five prayers, the first four were rejected, and the fifth conceded. The appellee submitted one prayer which was granted. The appeal is taken from these rulings below. Omitting the second of the appellant's series (which was not insisted on in this court), they all maintain the proposition, that the words spoken, though actionable "*per se*," if spoken in relation to a subject as to which no larceny or felony was capable of being committed, or was committed, the charge will not be actionable.

The first prayer was refused absolutely, the third and fourth upon the ground that there was no evidence to sustain them; from which it might be inferred that if there had been in the judgment of the court below, evidence tending to show the words were used in relation to the letter, or the matters contained in it, those prayers would have been granted.

The doctrine of the elementary writers on slander is, that words should be construed in reference to the subject-matter — "words may import a charge of felony, yet if it appear that the fact charged could not have happened, an action cannot be maintained." *Snagg v. Gee*, 4 Co. 16 a; *Jackson v. Adams*, 2 Bing. N. C. 402; *Stephens' Nisi Prius*, 2553.

Lord HOBART says, "The slander and damage consist in the apprehension of the hearers; and in Gilbert's Cas. on Law & Eq., the rule laid down is, that the words shall be taken in the sense in which the hearers understood them." Ibid.; *vide* also 1 Am. Lead. Cas., Hare & Wallace, 118, Notes to *Broker v. Coffin, etc.*, (3d ed).

Lord DENMAN, in the case of *Read v. Ambridge*, 6 C. & P. 308, after having stated to the jury that the first question for their consideration was whether they thought the words showed an intention to impute felony, observed "it is said, that the words evidently meant that the plaintiff had robbed Mrs. Read, by injuring her in trade." But if the defendant meant to convey that meaning, it seems to me he should have used very different words. It is not enough that he had some reservation in his own mind. The question is, *what he meant to make other people believe?* whether he meant to have it understood by others that the plaintiff had committed a felony?

The words used in this case, were, "Do you know that you are extremely wrong for putting that damned thief's name in your window; he is the most blasted thief in the world, and ought to have been hung with his aunt years ago. You may tell him from

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me, that he is a bloody thief, and I can prove it; and he ought to be hung." The jury found a nominal verdict for the plaintiff.

Mr. Chitty, in his note to 3 Black. Com. 123, upon injuries affecting reputation, after specifying words which are actionable in themselves, says, "The accusation, however, must be precise, or have such an allusion to some prior transaction, that the hearers of the slander must necessarily have understood that the slanderer meant to impute to the plaintiff guilt of some punishable offense; for though the rule of construing words '*in mitiori sensu*,' is now exploded, yet an innuendo or construction cannot be given to words which they do not necessarily import, either of themselves, independently of any other circumstances, or with necessary reference, or some other circumstances occurring at the time of the accusation. *Holt v. Scholefield*, 6 T. R. 691; *James v. Rutlech*, 4 Co. 17 b.; *Anonymous*, 11 Mod. 99, etc." In the case of *Garret v. Dickerson*, 19 Md. 418, this court recognized this principle, and said in case of slander, words take their actionable character from the sense in which they appear to have been used, and that in which they are most likely to be understood by those who hear them. *Vide* also, 2 Greenl. Ev., § 417, (13th ed.), 378.

The words laid in the several counts, both those which are actionable "*per se*," and those which are not, are charged as being spoken in the second person, addressed to the plaintiff himself.

The evidence of the plaintiff, testifying for himself, is, that these words were part of a violent, verbal remonstrance by the defendant against the conduct of the plaintiff, in writing a letter to a third person, relating to defendant's transactions with him—referring to the letter and its contents, the defendant said the plaintiff was "a liar," "a confidence man"—"no better than a thief,"—a thief—that the plaintiff "had sued him," and he had offered to pay more than I (the plaintiff) would ever get—"the substance of what Fawsett said in regard to the letter was, that I (the plaintiff) had charged him therein with making false accounts."

All the witnesses corroborate this view. The circumstances show that the terms of reproach used were mere abuse—the outpouring of passion; "liar," "thief," "confidence man," were uttered in quick succession in reference to the contents of the letter, explaining to all who heard them the sense in which they were used.

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himself, whereby he clothed his sister with power to draw the money, as he might need it during his contemplated absence from home; and to that extent Margaret Taylor was constituted his agent or trustee, but to no other intent or purpose whatever. In the answer of Margaret Taylor and her husband it is averred that, by the deposit, the deceased appropriated the money to the joint ownership of himself and his sister, Margaret Taylor, and to the survivor of them, with power to each of them, during their joint lives, to draw the money from the bank; and that by the death of Joseph Henry, the whole title to and interest in the money thus deposited vested in Margaret Taylor by survivorship, according to the terms and effect of the deposit; and that no further act was necessary to invest her with the title to the same.

It appears that the deceased was very anxious about the care and support of his aged mother, who survived him. He made some provision for her support during his life-time; and he seems to have been anxious that she should be provided for after his death. He made his will on the 6th of July, 1866, whereby he gave to his mother \$400, to be placed in the hands of David Murray, his brother-in-law, for her benefit; he gave to his sister Eliza Woolford, at whose house he died, the sum of \$600; and he gave to his sister Margaret Taylor \$300. He also gave to his uncle \$50. He appointed no executor. The will was admitted to probate soon after his death; and it is not pretended that the testator had any other money or estate with which to gratify the bequests in his will than the money on deposit in the savings bank.

The whole question depends upon the meaning and intention of the deceased in making the deposit in the form adopted, as gathered from the entry in the bank-book, and all the circumstances surrounding the deceased at the time.

A large mass of testimony has been taken, showing a great deal of family talk and dissension in regard to this money; but of all the evidence produced, there is only a small part of it that is of any material value in deciding the case.

It is quite certain that if the words, "and survivor of them," had been omitted in making the entry in the bank-book, the case would have been free from all question or difficulty. The case of *Murray v. Cannon*, 41 Md. 466, would then be quite decisive in establishing the proposition that the entry in the bank-book would not be sufficient evidence of a complete and perfect gift.

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But do those words, when taken in connection with those which precede and those which follow them, in the entry, import either a gift *inter vivos*, or a gift *causa mortis*?

That they do not import a gift *inter vivos* would seem to be clear, upon the most obvious construction. To make such gift perfect and complete, there must be an actual transfer of all right and dominion over the thing given by the donor, and an acceptance by the donee, or some competent person for him; and it is essential, to the validity of such gift, that it should go into effect, that is, transfer the property at once and completely; for if it has reference to a future time when it is to operate as a transfer, it is but a promise without consideration, and cannot be enforced, either at law or in equity. Until the gift is thus made perfect a *locus penitentie* remains, and the owner may make any other disposition of the property that he may think proper. *Pennington v. Gittings*, 2 Gill & Johns. 208; *Cox v. Hill*, 6 Md. 274; *Nickerson v. Nickerson*, 28 id. 332; *Hitch v. Davis*, 3 Md. Ch. Dec. 266.

Here, the deposit was in the joint names of the deceased and his sister, and the survivor of them, but subject to the order of either. Having thus retained the power to draw out the money, the deceased did not divest himself of dominion and control over the fund. He could have drawn out every dollar the day after the deposit, or at any time up to the moment of his death, and applied it in any manner he might have thought proper. It is not contended that the sister had the least right or interest in the money before the deposit; nor is it contended that she acquired any interest therein otherwise than by the supposed gift of the brother; and the only evidence relied on to support the *factum* of the supposed gift is the form of the entry in the bank-book. But as will be observed, there are no terms in the entry that import of themselves an actual present donation by the brother to the sister; and the dominion retained by the brother over the fund enabled him to displace and utterly destroy all power conferred upon the sister in respect to the fund. As the mother's name had been erased and that of the sister inserted, so the name of the sister could have been erased, without the slightest question of the brother's right to do so. The sister never exercised any power or control over the fund during the life of the brother. It was only after his death that she attempted to assert right and dominion over it; and then by the supposed right of survivorship.

But if the supposed gift was not perfect and irrevocable during the life of the donor, it could become so after his death only as a *donatio mortis causa*; and from the form of the entry, and the facts of the case, it is impossible that the transaction can be allowed to prevail as a *donatio mortis causa*.

In order to render perfect a *donatio mortis causa*, three things must concur: 1. That the gift be made with a view to the donor's death; 2. That it be with a condition, either express or implied, that it shall take effect only on the death of the donor by a disorder from which he is then suffering; and 3. That there be a delivery of the subject of the donation.

Now it is true, the deceased was, at the time of the deposit in the bank, suffering from the disease of which he died; but it nowhere appears that the deposit was made, and the particular form of entry adopted, with a view to and in expectation of death from the existing disorder. And as we have seen, the entry of itself does not import a gift, and there was no such delivery of possession of the subject of the supposed donation, as the law makes necessary to perfect either a *donatio inter vivos* or a *donatio mortis causa*. In making a gift *causa mortis*, the donor does not part with the whole interest, except only in the particular event of death; and it is of the essence of such a gift, that it shall not otherwise take effect; and it remains subject to his revocation at any time before the event of death. But nevertheless, it is essential, in order to give effect to the donation, that the deceased should not only part with the possession, but also with the present dominion over the subject of the gift, subject only to subsequent revocation; and in this case, as we have seen, there was neither possession nor dominion surrendered by the deceased, at any time before his death. *Bradley v. Hunt*, 5 Gill & J. 58; *Reddel v. Dobree*, 10 Sim. 244.

Nor can the claim of the appellant, Margaret, be sustained upon any principle of trust.

The cases upon this subject establish the doctrine to be, that where a person intends to give property to another, and vests that property in trustees, and declares a trust upon it in favor of the subject of his bounty, by such acts the gift is perfected, and the author of the trust loses all dominion over it; and in such gifts of mere personal estate, the declaration of trust may be made and proved by parol, without the aid of writing. And the cases go the length of maintaining that where the author of the gift retains the

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legal dominion over the subject of the gift in himself, but fully and completely declares himself to be the trustee of the property for the purposes indicated, there he will be treated as trustee, and the object of his bounty will be given the benefit of the trust. In all such cases the declaration of trust is considered in a court of equity as equivalent to an actual transfer of the legal interest in a court of law ; and if the transaction by which the trust is created be complete, it will not be treated as invalid for want of consideration. *Kilpin v. Kilpin*, 1 M. & K. 520; *McFadden v. Jenkyns*, 1 Phill. Ch. 153 ; *Hughes v. Stubbs*, 1 Hare, 476 ; *Collinson v. Pattrick*, 2 Keen, 123. The principle of these cases, to the extent we have stated it, has been fully recognized and adopted by this court, in the cases of *Cox v. Hill*, 6 Md. 274, and *Smith & Barber v. Darby*, 39 id. 268. For the purpose of establishing such trust, however, the evidence must be clear and unmistakable both of the intent and the execution of that intent. But in this case there is no evidence that reasonably tends to establish such trust. There is no reliable evidence of declarations of the deceased, either in writing or by parol, that tends to prove that he designed the money on deposit exclusively for his sister, or that he intended to give her any real interest in the money by inserting her name in the bank-book, apart from the entry itself. On the contrary, looking to all the circumstances surrounding the deceased, and the particular transaction in question, the presumption is strongly against any such intent on the part of the deceased. His declarations, conduct, and dealing with the subject-matter, all go irresistibly to show that he never did and never intended to part with or surrender his absolute control and dominion over the fund during life. Indeed, in his then low and feeble state of health, without other means of support, and being utterly unable to work, it would have been folly in the extreme for him to have placed the fund in such position as to render it even possible that all his beneficial control and dominion over it might at once be destroyed, and he left destitute and dependent. And yet this is what it is said he did in effect, upon the supposition that he intended that his sister should have the absolute right, at any time after the deposit, to draw out the money and apply it to her own exclusive uses and purposes, irrespective of his will or desire upon the subject. And upon the supposition of a complete and perfect declaration of trust, he would also have denuded himself of all power or control over the fund inconsistent with the trust

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declared; for it is well settled, that where a trust is once completely and effectually created, whether by a formal instrument, or by parol, where a parol declaration of the trust is sufficient, the trust is beyond revocation, by the simple act or declaration of the donor. *Smith & Barber v. Darby*, 39 Md. 278; *Kilpin v. Kilpin*, 1 M. & K. 531; *Adlington v. Cann*, 3 Atk. 151.

The conclusion to be drawn, and indeed the only rational conclusion that can be drawn, from all the facts and circumstances of the case is, that the form of the entry in the bank-book was nothing more than a device or arrangement by the deceased to subserve a matter of convenience to himself; and that the sister was simply constituted an agent with power to draw money from the bank to meet some supposed or apprehended emergency that might possibly arise in his absence from home.

This being the conclusion at which we have arrived, it results that the decree of the court below must be affirmed.

Decree affirmed.

DICKINSON V. MAYOR.

(48 Md. 583.)

Waste — subsequent alienation of premises.

An action for waste is not defeated by the transfer of the premises pending the action by the plaintiff to the defendant.

ACTION of waste. The opinion states the facts. The defendant had judgment below.

Henry Stockbridge, for appellant.

James A. Buchanan, for appellee. An action on the case for waste is an action for injury to the reversion; and the plaintiff must show that at the time the action was brought and the case tried, he had and owned the reversionary interest in the premises alleged to have been wasted or injured by the defendant. *McLaughlin v. Long*, 5 H. & J. 113; Coke upon Littleton, 53 b; *Bacon v. Smith and another*, 1 Ad. & Ell. (Q. B.) 345; 10 Bac. Abr. (ed. of 1846), title Waste, pp. 438, 439, 450; 1 Chitt. Pl. 142; 3 id. 344, n. 2; *Goodwright v. Vivian*, 8 East, 190; *Greene v. Cole*,

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3 Saund. 252, n. 7; *Kinlyside v. Thornton*, 2 W. Bl. 1111; *Attersoll v. Stevens*, 1 Taunt. 183; *Herne v. Bembow*, 4 id. 764; 1 Saund. 323, n. 7; *Pomfret v. Ricroft*, 2 Black. Com. 178.

STEWART, J. The appellant had leased to the appellee, or its agent, a certain store or cellar, in the city of Baltimore, for the term of three years; the term had expired and the property was surrendered to her. Waste thereon, or injury thereto, being alleged to have been committed by the appellee during the tenancy, this action was brought for the recovery of damages therefor. During the pendency of the action the appellant conveyed the property to the appellee. This alienation was relied upon as a sufficient defense to the action, the appellee insisting that to enable the appellant to recover it was necessary not only that she should hold the reversionary interest when the waste was done, but at the time of the recovery. The Superior Court entertained this view, and so ruled, in which we think there was error.

The right of the appellant otherwise to recover seems not to have been questioned.

The law in regard to ancient and modern remedies for waste is well stated in note 7, *Greene v. Cole*, 3 Wms. Saunders, 252.

The action of waste as formerly known was a mixed action, being partly real and partly personal, and consisted in privity, and by it the owner of the inheritance in reversion, or remainder, in fee or tail, recovered against the tenant in dower, tenant by the curtesy or guardian in chivalry, the thing or place upon which the waste was committed, and also damages for the injury. It was therefore necessary that the plaintiff should be entitled to the property upon which the waste was committed, not only at the time of the waste, but when the recovery was had. There can be no doubt, therefore, that the action of waste could only be brought by the person having the inheritance at the time when the waste was committed to his prejudice by the respective tenants aforesaid, and being confined in its operation to the proprietor of the inheritance and the tenant of the land, between whom there existed a relation of privity to some extent, according to the nature of the tenure, if, after the waste, the inheritance was alienated, and that privity broken up, the action of waste was gone. 1 Co. upon Lit. 53 a.

By the Statute of Marlbridge, 52 Henry 3, ch. 23, and of Statute 6 Edw. 1, ch. 5, the action of waste was given a wider range, and

could be brought against lessee for life or years, or against the assignee of the same for waste done after the assignment. 1 Sharwood's Black. Com. 283; 2 Black. Com. 178, n. 7; *Greene v. Cole*, 3 Wms. Saund. 252, n. 7.

To avoid the defective and inadequate remedy afforded by this action, as known to the common law, or as modified by the statutes of Marlbridge and Gloucester, and to provide an effectual remedy or method of recovery against tenant or stranger where no privity existed better adapted to the exigencies of the case, the action on the case *in the nature of waste*, as it is denominated, was devised, which enables the party who has been injured in his reversionary right to recover damages for the same, and whether he has become repossessed of the property after the injury, or has transferred the same, does not affect the claim for the damages committed to his property at the time it belonged to him. It extends to every case where one who has any reversionary interest or estate in the premises suffers by the *tortious* act of the actual tenant or occupant. The transfer of the estate afterward cannot operate to condone the wrong.

It is an equitable action and not to be discountenanced by any technical consideration, but must be sustained in all cases, and against all persons who are by the common law or under the statutes aforesaid liable to the action of waste. *White v. Wagner*, 4 H. & J. 373; 7 Am. Dec. 674, per Justice JOHNSON.

It can be brought by a party in remainder for life or years, as in fee or tail, who held the interest at the time of the injury. *McLaughlin v. Long*, 5 H. & J. 113.

It entitles the party to recover for the actual damage committed, with costs, against any one who commits the wrong, whether lessee or stranger. 1 Wash. on Real Prop. 153; 4 Kent's Com. 83; Taylor's Landlord and Tenant, § 638; Add. on Torts, 245.

The case of *Bacon v. Smith*, 41 Eng. Com. Law, 571, is not in conflict with this view. The husband and wife there were seized of the messuage for their joint lives and the life of the survivor; and all of the husband's interest became vested in the defendant, who permitted the waste during the life-time of the husband. It was held by the court that the wife who survived her husband could not maintain an action on the case against the defendant in respect to such waste. The ground of the decision was, that there was no vested interest in the wife at the period when the waste was committed. The remark of PATTERSON, J., referring to Co. Litt.

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53, b, that "after waste done there is a special regard to be had to the continuance of the reversion in the same state that it was at the time of the waste done, and that the action of waste is said to 'consist in privity,'" assumes that this has reference to the old form of action of waste. That privity is no longer necessary is well established, for the action may be brought against a stranger. The further remark of PATTERSON, J., "that the rule equally applies to the action on the case in the nature of waste," seems merely his *dictum*, and we have not been able to find any case to sustain him in that view.

In the case of *Dupree v. Dupree*, 4 Jones' Law, 387, where it was held that the purchase by the reversioner of the estate of the particular tenant after the waste committed was no valid objection to his right of action, reference is made by the learned judge (BATTEL), who delivered the opinion of the court, to the idea urged in the argument of that case, that there must exist a particular estate, and a reversion at the time when the action is brought, as well as when the waste was committed.

The counsel in that case relied upon Co. Litt. 53, b, and the remark of PATTERSON, J., but the court held that the action in the nature of waste was not confined as the old action of waste was to the owner of the inheritance against his tenant for life or years; but can be brought by a person in remainder or reversion, for life or years, as well as in fee or in tail, and against a stranger as well as against a tenant.

That it may be brought also in the *tenuit* against a tenant after the term for life or years has expired — that privity is not essential to the maintenance of the action, and nothing to forbid a remainderman or reversioner after the purchase by him of a particular estate from recovering for the waste done before — that the right to damage for the waste done does not depend on the *tenure*.

Upon what sound principle can it be held, that because the reversioner of the estate after the waste committed has alienated her interest (whether to the party committing the waste or to another can make no difference), she is to be precluded from a recovery? We know of none.

If the plaintiff here held that the reversionary interest in the property at the time the alleged waste was committed, she is entitled to recover for the same, and her alienation of the property subsequently or during the pendency of the suit for damages cannot operate to defeat her right of recovery.

Judgment reversed and new trial ordered.

CASES
IN THE
SUPREME COURT
OF
MISSISSIPPI

JAMES V. STATE.

(55 Miss. 57.)

Trial — right to poll jury — separation.

The refusal of the court to poll the jury is error for which a judgment will be reversed. (See note, p. 497.)

The jury returned their written verdict to the clerk, during a recess, without consent of the parties. They then separated for half an hour, discussing the verdict with many meanwhile. Being recalled by the court, and asked if they had agreed, they answered that they had, and they then handed the verdict to the court. Held, no error.

ACTION on tax collector's bond. The verdict, which was for the plaintiff, was, during a recess of the court, returned to the clerk, without the consent of the defendants. The jury then separated for about half an hour, discussing the verdict with many meanwhile. Being then recalled by order of the court, in answer to an inquiry by the court, they stated that they had agreed upon a verdict, which they handed to the court. A motion for a new trial was overruled.

Tucker & Harper, Martin & Bates, and B. F. Owen, for plaintiff in error.

CAMPBELL, J. [Omitting a question on the merits.] A verdict is the unanimous decision made by a jury, and reported to the

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court. Examining the jury by the poll is the only recognized means of ascertaining whether they were unanimous in their decision, and the right to do this must exist. It is affirmed in criminal cases, and is equally applicable in civil cases. In no other way can the right of parties to the concurrence of the twelve jurors be so effectually secured as by entitling them to have each juror to answer the question, "*Is this your verdict?*" in the presence of the court and parties and counsel. By this means any juror who had been induced in the jury-room to yield assent to a verdict, against his conscientious convictions, may have opportunity to declare his dissent from the verdict as announced. Parties should have the means to protect themselves against the consequences of undue influences of any sort, which, employed in the privacy of the jury-room, may extort unwilling assent to a given result by some of the jury. Less evil is likely to result from upholding the right to have the jury examined by the poll than from denying it. The modern relaxation of the rules as to what irregularities of the jury will vitiate a verdict makes it more important to preserve the only allowable means of ascertaining if the verdict as announced is the unanimous decision of the jury. *Fox v. Smith*, 3 Cow. 23; *Jackson v. Hawks*, 2 Wend. 619; *Johnson v. Howe*, 2 Gilm. 342; *Rigg v. Cook*, 4 id. 336.

The separation of the jury in this case did not vitiate the verdict. According to the old rule it would, but a sounder view now prevails. 2 Gra. & Wat. on New Tr. 547.

Judgment reversed, new trial granted, and cause remanded.

NOTE BY THE REPORTER.—It has been held in several States that the parties have the absolute right to poll the jury in civil cases. In *Fox v. Smith*, 3 Cow. 24, the court said: "I think this cannot be a matter of mere discretion. It has been the uniform practice at the Circuit, as far as I have been acquainted with it, to allow the jury to be polled whether the verdict be sealed, as here, by consent, or delivered, *ore tenus*, by the foreman." In this case the request was made at the time of receiving the verdict. In *Jackson v. Hawks*, 2 Wend. 620, the court say: "It is the undoubted right of a party to poll a jury on their bringing in their verdict, and he cannot be deprived of it, but by his express assent." These cases were expressly approved in *Labar v. Koplin*, 4 N. Y. 550, and are there deemed to have overruled the idea that the polling is discretionary with the court, as implied in *Blackely v. Sheldon*, 7 Johns. 82. The same doctrine was held in *Hubble v. Patterson*, 1 Mo. 322, and in *Johnson v. Howe*, 7 Ill. 343, the right is said to be "unquestionable;" and in *Rigg v. Cook*, 9 id. 336, it is held that the right exists whether the verdict is oral or sealed.

In some States the right of polling the jury in civil causes is discretionary with the court. In *Martin v. Maverick*, 1 McCord, 24, it is so held, the court saying: "It is insisted, however, that a party has a right to the expression of the individual opinion of every juror. The answer is, he has it in their tacit assent to the verdict: for it can scarcely be believed that any one would so far forget himself and the laws of the country as not to expose any misrepresentation of their verdict agreed on. I confess, however, I have less objection to the thing itself than to the purposes to which it might and probably would be prostituted. It might be used as a means of torturing a weak and dependent juror into a disavowal of

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a verdict founded on reason and justice ; and it would be mischievous in the extreme to allow it in cases sounding in damages, where the verdicts must always be to the effect or compromise rather than the exercise of individual judgment. It is further insisted that it is necessary as a means to guard against the misconduct of the jury. But an ample security, I think, is to be found in the exercise of the discretion of the court, in allowing it where there were well-founded suspicions of misconduct."

Precisely the same view was taken in *Smith v. Mitchell*, 6 Ga. 465, followed in *Rutland v. Hathorn*, 36 Id. 386. No discussion of the principle was had, but the case of *Martin v. Maverick* was cited, as also were *Com. v. Roby*, 12 Pick. 496, and *Fellows' case*, 5 Greenl. 833. The question was not exactly pertinent, for the jury had finally dispersed before the request was made, and it is almost universally held to be then too late. The same was held in *Landis v. Dayton*, Wright (Ohio), 659, without discussion, the court saying, "It is mere matter of practice for each court to regulate for itself." In *Blum v. Pate*, 20 Cal. 69, the question was "whether a party has the right in a civil action to poll the jury after their verdict is recorded." This is decided in the negative, and the court observe that the right of polling rests in discretion ; following the South Carolina and other cases above mentioned.

Except in Massachusetts, Maine, and South Carolina, we believe the right of polling the jury in criminal cases is absolute. Thus in *People v. Perkins*, 1 Wend. 91, a verdict of guilty in the absence of the defendant was reversed, the court saying he "should have been present on receiving the verdict, so that he might have availed himself of the right of polling the jury." Exactly the same was held in *Nomaque v. People*, 1 Ill. 149, and it was held that the prisoner could not waive his right to be present and poll the jury. The very same was held, on the authority of *People v. Perkins*, in *State v. Hughes*, 2 Ala. (N. S.) 104, the court citing also 2 Hale's P. C. 299. This was recognized in *Brister v. State*, 26 Ala. (N. S.) 131, where it is said that the only reason for requiring the presence of the prisoner on the receiving of the verdict is that he may poll the jury. So again in *Sargent v. State*, 11 Ohio, 472, and *Temple v. Commonwealth*, 14 Bush, 769 ; s. c., 29 Am. Rep. 442.

In *Stewart v. People*, 23 Mich. 76, the court said : "The court was clearly in error, we think, in declining to allow the jury to be polled." "The ground of the refusal was that the prisoner had consented to a sealed verdict ; and one having been returned accordingly, he was precluded by this consent from the inquiries which would have been admissible otherwise. But why this should preclude him is not very evident. There is certainly nothing in the mere fact that a juror's name is appended to a written conclusion, which negatives the possibility that the conclusion is one he does not assent to. How is the prisoner to know that this is really the verdict of all ; that all have personally signed it, and no one has been coerced, cajoled or deceived into assenting to that which his judgment does not concur in ? There is no mode of trying a question of this description, except by taking the evidence of the jurors themselves when they return into court ; the case cannot stop to await the result of a suit in chancery to set aside the verdict for fraud or oppression. It is not claimed by the prosecution, as we understand it, that the jurors are so far concluded by their signatures that no questions whatever are to be put to them afterward, but it is insisted that the prisoner has no right to have the inquiry pushed beyond the formal question which is always put to the whole jury together, whether this is the verdict of all. In other cases it is conceded that the right to have the jury polled cannot be questioned ; and experience shows that notwithstanding the formal response, there are many cases in which individuals refuse to assent on being polled. This formal response is consequently not evidence of a very conclusive character," etc. "We think the prisoner has the same right to have the question of assent put to each individual juror in case a sealed verdict is returned, that he has in any other."

The question whether the jury are concluded by their signing a sealed verdict from afterward dissenting from it receives light from the decision in *Rout v. Sherwood*, 6 Johns. 66 ; 5 Am. Dec. 191. In that case "the trial lasted till late in the evening, and after the charge of the judge, the parties consented that the jury might seal up their verdict. At the opening of the court, on the next day, the jury appeared, and the foreman delivered the sealed verdict, which was opened and read, by which the jury found for the plaintiff for \$150 damages. On being polled nine of the jurors dissented from the verdict ; but at the same time stated that they did agree to the verdict when it was made, and so informed the constable before they separated. The judge directed the verdict to be entered, subject to the opin-

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ion of the court, on the question whether the same ought to be recorded." And the court held: "The jury, when they came to the bar to deliver in their verdict, had a right to dissent from the verdict to which they had previously agreed. There is no verdict of any force but a public verdict, given openly in court; until it was received and recorded it was no verdict, and the jury had a right to alter it as they may a private verdict. The previous agreement that the jury might seal up their verdict did not take away from the parties the right to a public verdict, duly delivered."

In *State v. Young*, 77 N. C. 498, a criminal case, the court say: "The right of the judge to poll the jury is immemorial, and has never been questioned so far as we are informed. We can see no good reason why it should be denied to the defendant, and we cannot conceive of a case in which any harm would result from the exercise of it under the direction of the court, and experience shows that notwithstanding the response of the foreman for the jury, there are cases in which individual jurors refuse to assent on being polled. How is the defendant to know that this is really the verdict of all, and that no one has been deceived or coerced into an assent to that which his judgment does not now concur in? There is no mode of ascertaining this fact except by the evidence of the jurors themselves when they come into court. When the verdict has been received from the foreman and entered, it is the duty of the clerk to cause the jury to hearken to their verdict as the court has it recorded, and to read it to them and say: "So say you all." At this time any juror can retract on the ground of conscientious scruples, mistake, fraud, or otherwise, and his dissent would then be effectual. This right is surely one of the best safeguards for the protection of the accused, and as an incident to jury trials would seem to be a constitutional right and its exercise is only a mode, more satisfactory to the prisoner, of ascertaining the fact that it is the verdict of the whole jury."

In *United States v. Potter*, 6 McLean, 186, there was a sealed verdict. On motion of the defendant's counsel the jury was polled, and the following order made, which shows the proper practice in such cases: "And the jurors aforesaid being each separately interrogated by the court whether the foregoing verdict is his verdict as it stands recorded, each for himself separately answers that it is." Bishop, in *Crim. Proc.*, § 830, citing the last case, says: "If the jury have brought in a sealed verdict by consent, they are not to be interrogated thereon, but they must be polled if this be demanded."

The right of polling in criminal cases was held to rest in discretion, in *State v. Allen*, 1 McCord, 526, on the authority of *Martin v. Maverick*, without any consideration, citations or distinction. This was followed in *State v. Wise*, 7 Rich. L. 420, but "the ground was not pressed by counsel," and the case was decided without much consideration. In *Commonwealth v. Roby*, 12 Pick. 513, the same is held. SHAW, C. J., said: "It is a question of some difficulty." He distinguished the New York authorities as civil cases, and puts the decision on the ground that it is mere matter of practice or form, and the practice had never obtained in that State in either civil or criminal cases. He refers to *Ropps v. Barker*, 4 Pick. 239, as sustaining the same view, saying of it: "The verdict having been drawn up and put into form at the bar, and a question being made whether the verdict thus reduced to form expressed the real intent and meaning of all the jurors, the judge was requested to poll the jury, which was not complied with. Upon this and other grounds a new trial was moved for." In regard to this part of the motion the court say: "When the jury have found a verdict substantially it is read to them in form. If any juror does not agree to it when so read he may express his dissent, and the jury may retire and reverse the verdict. But if, when asked in the usual manner whether they agree to the verdict, they all answer in the affirmative, it will be sufficient to authorize it to be recorded." This case was recognized in *Com. v. Tobin*, 125 Mass. 203; s. c., 28 Am. Rep. 220, 222, 223.

So in *Fellows' case*, 5 Me. 333, it was said: "The course of proceeding on the part of the court was according to uniform and immemorial usage in Massachusetts, and our own practice since our separation from the Commonwealth; and we perceive no reason for changing the course, though a different one may have been in use in other States. It is of no consequence whether the question proposed by the clerk to the jury, as to their affirmation of their verdict, be directed to them jointly or separately; in either case all are called on by way of inquiry, whether in open court they consent to the verdict signed or announced *ore tenus* by their foreman. If no one objects, all are considered by their silence as expressing their consent."

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In *Smith v. State*, 59 Ga. 513; s. c., 27 Am. Rep. 893, it was held that the prisoner had waived his right to poll the jury by consenting at night that the jury might disperse after they should have agreed, and that the foreman might hand it into court the next morning. See note, 27 Am. Rep. 894.

In *U. S. v. Bridges*, U. S. Circuit Court, northern district of Alabama, October term, 1878, it was held by BRUCE, J., in an oral opinion, that where a defendant in a criminal case agrees to a sealed verdict, and the jury deliver their verdict of guilty to the clerk and then separate, the defendant has no right to have the jury polled when the verdict is read, his right being waived. See 10 Cent. L. J. 7 Defendant's counsel cited among other cases which have been hereinbefore mentioned *Cook v. State*, 60 Ala. 89, as opposed to the ruling.

HAMILTON V. BOOTH.

(55 Miss. 60.)

Marriage — crop raised by wife on husband's land.

Although a wife is by statute entitled to the fruits of her own labor, yet if she expends moneys and furnishes mules in the cultivation of crops on land leased by her husband, and mainly worked by himself and his two minor sons, the crops belong to him and are subject to his debts.

REPLEVIN. The opinion states the case. The plaintiff had judgment below.

T. H. Somerville, for plaintiff in error.

W. B. Helm, for defendant in error.

CHALMERS, J. Certain judgment creditors of W. A. Booth caused execution to be levied upon the cotton in controversy, as his property. Thereupon his wife sued out her writ of replevin, claiming it as belonging to herself.

It seems to have been produced under the following circumstances: It was grown upon a tract of land leased by the husband from a relative, the only rent charged or paid consisting of repairs upon the houses and fences. It was produced by the labor of the husband, his two minor sons, and a laborer, the latter of whom received a part of the crop as wages, and who claims no interest in this controversy. The mules of the wife were worked in its cultivation. Her money was used on the farm until June, when it became exhausted, after which supplies were obtained upon mortgage on the crop, executed by the husband in his own name, but which the parties testify, was executed by him as agent of the wife. Both

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husband and wife testify that it was considered during the year as the wife's crop, and that she employed and paid some day laborers who worked for a few days in its cultivation.

To whom does the cotton belong in law? We must regard the husband, under the proof, as being the owner of the term in the land, and this, we think, fixes the title of the product.

Creditors have no lien upon the labor or skill of the husband, and no means of compelling him to work for them; but if he does labor and produce property, it becomes liable to his debts, unless exempt. So, also, with the labor of his minor sons. As father, he may claim their earnings, or emancipate them, as he pleases, and if he adopts the latter course, creditors cannot complain, because they have no right to demand that the children of their debtor shall be compelled to work for their benefit. But if the father does not emancipate them, but on the contrary claims, and retains their labor for himself, the fruits of it will belong to him, and hence will be liable to the demands of his creditors. Upon the same principle a husband may devote his time and skill to the management of his wife's farm, and the products will belong wholly to the wife, because they are but the accretions of her property, and he has a right to give her his labor. So, also, if the wife, although she is, under our statute, entitled to the fruits of her own labor, devotes that labor to the cultivation of crops on her husband's land, she is simply producing property for him which will be subject to the attack of his creditors. If she suffers her money or her work-animals to be used, she becomes to that extent his creditor, and might, under some circumstances, be entitled to rank as a preferred creditor in a court of equity, but she cannot thereby affect the legal title of the crop produced,

It belongs to the husband, because grown on his land. To permit husband and wife to alter this manifest legal consequence, by any understanding between themselves that a crop produced upon his land by the labor of himself and minor sons shall be considered as her property, by reason of the use of her mules or money, would open wide the door to frauds upon creditors. *Gage v. Dauchy*, 34 N. Y. 293; *Knapp v. Smith*, 27 id. 278; *Rush v. Vought*, 55 Penn. St. 437; *National Bank v. Sprague*, 20 N. J. Eq. 14; *Quidort v. Pergeaux*, 18 id. 473; *Pawley v. Vogel*, 42 Mo. 292; *Gladden et al. v. Taylor*, 16 Ohio St. 509.

Judgment reversed and cause remanded.

PORTER V. HALEY.

(55 Miss. 68.)

Married woman — contract to pay attorney's fees.

A married woman may bind her separate estate by a contract for compensation of an attorney at law for his services in defending her interests in a legal proceeding in reference thereto or affecting the same, although the enabling statutes do not expressly authorize such employment.

ACTION for services. The opinion states the case. The plaintiff had judgment below.

J. A. Brown, for plaintiff in error. A married woman can charge her separate estate, held under the statute, only in the manner and for the purposes specified in the statute. The power to charge an attorney's fee on her separate property is not given in the act, nor can it be implied from any power or powers conferred thereby. These enabling statutes, in derogation of the common law, must be strictly construed. *Edwards v. Stevens*, 3 Allen, 315; *Brookings v. White*, 49 Me. 481; *Eckert v. Reuter*, 33 N. J. 268; *Perkins v. Perkins*, 62 Barb. 531; *Davis v. Burnham*, 27 Vt. 567; *Snyder v. Webb*, 3 Cal. 87; *Drais v. Hogan*, 50 id. 128; *Whipple v. Giles*, 55 N. H. 139; *Hardin v. Pelan*, 41 Miss. 114. And in *Wilson v. Burr*, 25 Wend. 386, it is decided that the statute enabling the wife to sue does not authorize her to contract the debt for the attorney's fee.

H. B. Mayes, for defendants in error.

SIMRALL, C. J. Haley & Stone rendered the services as solicitors, in the defense of a suit in chancery, brought against Mrs. Porter and her husband, involving her right to real estate claimed by her as separate property.

So that the question, in the abstract, is whether a married woman (who owns separate estate, as is agreed) can contract to pay a solicitor compensation for the defense of a suit brought to affect her rights to separate real estate.

There can be no doubt that if property is settled to her separate use, so as to constitute her the beneficial owner of an equitable estate, she could charge that estate with such liability, enforceable

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against it in a court of equity. But it is argued that the property attempted to be subjected in this suit was a statutory, legal estate, and that the power of Mrs. Porter over it, and her capacity to bind it, was governed altogether by the statute — that we must look alone to it for her authority to make the contract. The premise is undoubtedly correct.

The statute, section 1778 of the Code of 1871, continues to a woman, after marriage, every species and description of property owned at the time of the marriage, as her separate estate. So also, acquisitions after marriage, including the fruits of her personal service. And money recovered for damages to her person shall constitute personal estate. By section 1779, the rents, issues, and income of the separate estate shall accrue and inure to the wife, and shall not be taken for the husband's debts. Section 1780 allows the wife to rent her land, make contracts for the use thereof, loan her money, take securities therefor in her own name, and employ it in trade or business.

It would be vain and nugatory to confer these large property interests and rights on married women, and deny them free access to the courts for their assertion and defense. If a wife may take to herself damages recovered for a personal injury, the law does not intend that her property may be despoiled, and no compensation enforced against the wrong-doer. If she is disseized of her lands, may she not employ the usual and necessary aids allowed other land-owners to regain possession, and recover damages equivalent to the rents and profits of which she has been deprived ?

It is admitted that express authority is not given by statute to employ counsel and engage to pay fees, but she may sue, alone or jointly with her husband, "for the recovery of her property or rights;" and she may be sued "on all contracts, or other matters, for which her individual property is liable." Code 1871, § 1783. She may execute a bond necessary in any proceeding, either at law or in equity, to establish or enforce her rights, and the same shall be binding, etc. Code 1871, § 1781. She may contract for work and labor for the use and benefit or improvement of her separate estate. Code 1871, § 1780.

This legislation implies that the courts shall be open to the wife to sue both for the recovery of her property or "rights." The principal power carries with it all incidents necessary to its efficiency. So she may be sued on her contracts, and other matters; the power

to *defend* a suit is necessarily implied. It would be folly to say that she could not consult and employ counsel, if that were usual, proper, and necessary.

Since she may be impleaded in the courts in matters affecting her separate estate, she must be esteemed competent to avail of all the aids and facilities open to suitors generally. If she may loan her money and take securities therefor, without further provision of law, she could sue on the note or bond, or foreclose the mortgage, and could engage an attorney, and contract to pay for that service. By express statute, she may make any bond incident to judicial proceedings.

It was held in New York, in *Frecking v. Rolland*, 53 N. Y. 422-425, that under a statute allowing a married woman to carry on any trade or business, etc., the power to make contracts relating to her business was incidental to her power of conducting it. *Adams v. Honness*, 62 Barb. 326; *Chapman v. Foster*, 6 Allen, 136.

We have been referred, by counsel for the appellant, to several cases supposed to sustain his view. *Putnam v. Tennyson*, 50 Ind. 459, illustrates the class. There, the effort was to hold the wife bound for attorney's fees to prosecute a suit for divorce. Such a contract fell under the common-law rule, and was not affected by the statute. It had no relation to the separate estate or property interests of the wife.

Judgment affirmed.

FOSTER v. METTS.

(55 Miss. 77.)

Bailment—carrier of mails—liability for money stolen from mails.

One who contracts to carry the mails for the government is neither a common carrier nor a private carrier, and is not liable to the owner for money stolen from the mails by his subordinates; and his promissory note given therefor is without consideration and creates no liability as between the parties.

ACTION on a promissory note executed by the defendants' contractors for carrying the United States mails, to the plaintiff for his money stolen from the mail by the defendants' employee. The defendants at first refused to recognize any liability, but on

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the plaintiff's agreeing to wait a few months for payment, executed the note in suit. The defendants had judgment below on demurrer.

R. G. Rives, for plaintiff in error. The defendants have made themselves liable by giving their note. *Town of Ligonier v. Ackerman*, 46 Ind. 552; s. c., 15 Am. Rep. 323; Chitty on Cont. 43, 44; Story on Cont. 440.

As the mail-rider was their agent, and such employment afforded the opportunity of committing the injury, they are liable. *New Orleans, Jackson & Great Northern R. R. Co. v. Allbritton*, 38 Miss. 242.

Nugent & McWillie, for defendants in error.

CAMPBELL, J. The post-office department is a branch of the government, instituted for public convenience. The government of the United States has undertaken the business of conducting the transmission and distribution and delivery of all mail-matter. The government is the carrier of the mails. It carries them by the aid of agents it contracts with for this service. Contractors for carrying the mail are the agents of the government in the business undertaken by them. The sender of mail-matter has no contract with the carrier of the mail-bags, and does not commit his mail-matter to him, but to the government, which has undertaken to receive, carry, and deliver it. The contractor for carrying the mail is neither a common carrier nor a private carrier. He does not carry for individuals, nor receive any compensation from them. He has no knowledge of the mail-matter he carries, and no control over it, except to obey the instructions of the post-office department. Letters and packets are inclosed in government mail-bags, secured by locks provided by the government, and at all times subject to the supervision and control of the officers and agents of the government in the post-office department, who may open the mail-bags and inspect the mail-matter they contain at will. Contractors for carrying the mail are instruments of government whereby it performs the function of transmitting mail-matter from place to place in the execution of this part of its business.

Postmasters are necessary agents for the performance of the business of the post-office department, and those who carry the mail from place to place are equally necessary, and engaged in the business of the government.

A rider or driver employed by the contractor for carrying the mails is an assistant about the business of the government. Although employed and paid, and liable to be discharged at pleasure by the contractor, the rider or driver is not engaged in the *private service* of the contractor, but is employed in the public service. *U. S. v. Belew*, 2 Brocken. 280.

A carrier of the mail is required by law to be of a certain age, to take a prescribed oath, is exempted from militia and jury service, and is liable to certain penalties for violations of duty, as well as subject to be discharged from service by any postmaster in a certain contingency. He is a *subordinate agent of the government*, whose employment is contemplated and provided for by the government in contracting to have the mail carried. *Id.*

Contractors for carrying the mail are responsible for their own misfeasances, but not for those of their assistants. The assistants must answer for themselves. The only security for the safe transmission of packages by mail is the safeguards thrown around it by the regulations of the government, which announce that all valuables sent by mail shall be at the risk of the owner. All that the government promises in case of loss of money or other valuables from the mail is to endeavor to recover it and to punish the offender.

The duty of contractors to carry the mail is to carry it from place to place, subject to the regulations of the post-office officials. Their obligation is to the government. They and their assistants are agents of the government, and subject to the rule of law applicable in such cases. Story on Agency, §§ 313, 319 n, 321; Shearm. & Redf. on Neg., § 177.

It is well settled that postmasters are not liable for losses occasioned by the sub-agents, clerks and servants employed under them, unless they are guilty of negligence in not selecting persons of suitable skill, or in not exercising a reasonable superintendence and vigilance over their conduct. Story on Agency, § 319 a; Story on Bail., § 463; *Wilson v. Peverly*, 1 Am. Lead. Cas. 785; *Schroyer v. Lynch*, 8 Watts, 453; *Wiggins v. Hathaway*, 6 Barb. 632; *Keenan v. Southworth*, 110 Mass. 474; s. c., 14 Am. Rep. 613; Whart. on Neg., § 292; Shearm. & Redf. on Neg., § 180.

As remarked before, carrying the mail is just as necessary, and as much part of the business of the government as the service rendered at the offices by postmasters; and those employed about

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carrying the mail are as much the agents of the government as are postmasters and their clerks and assistants. The true test of the character of a person is, not who appoints or pays or may dismiss him, but whether or not he is about a public employment or a private service. 1 Am. Lead. Cas. 621; Story on Agency, § 319 *et seq.*

In *Conwell v. Voorhees*, 13 Ohio, 523, and *Hutchins v. Brackett*, 2 Fost. 252, it was decided that contractors for carrying the mail are not responsible to the owner of a letter containing money transmitted by mail and lost by the carelessness of the agent of the contractors carrying the mail. The rules applicable to agents of the public were applied. And although the doctrine of these cases is criticised in Shearm. & Redf. on Neg., § 180, and has been disputed in *Sawyer v. Corse*, 17 Gratt. 230, we adopt it as the better view.

In this case the money was stolen by the mail-carrier. As to that, he certainly was not the agent of the contractors for whom he was riding, and if they were liable for his acts within the scope of his employment, they were not liable for his willful wrongs and crimes. *McCoy v. McKowen*, 26 Miss. 487; *New Orleans, Jackson & Great Northern R. R. Co. v. Harrison*, 48 id. 112; *Foster v. Essex Bank*, 17 Mass. 479; *Wiggins v. Hathaway*, 6 Barb. 632; Story on Agency, § 309.

As the defendants in error were not liable for the money "extracted" from the mail by the carrier, they did not make themselves liable by giving their promissory note for it. It is without consideration. The compromise of doubtful rights is a sufficient consideration for a promise to pay money, but compromise implies mutual concession. Here there was none on the part of the payee of the note. His forbearance to sue for what he could not recover at law or in equity was not a sufficient consideration for the note. *Newell v. Fisher*, 11 Sm. & M. 431; *Sullivan v. Collins*, 18 Iowa, 228; *Palfrey v. Railroad Co.*, 4 Allen. 55; *Allen v. Prater*, 35 Ala. 169; *Edwards v. Bauah*, 11 M. & W. 641; *Longridge v. Dorville*, 5 B. & Ald. 117; 1 Pars. on Cont. 440; Smith on Cont. 157; 1 Add. on Cont. 28, § 14; 1 Hill on Cont. 266, § 20.

Judgment affirmed.

JONES V. LOVING.

(55 Miss. 109.)

Officer — of municipal corporation — personal liability of, for passage of ordinance.

When the officers of a municipal corporation are vested with legislative powers, they are exempt from personal liability for the mistaken use of such powers if within their authority, and if they exceed their powers, their acts are void and consequently do not impose personal liability.

ACTION for damages. The opinion states the case. The defendants had judgment on demurrer below.

L. O. Bridewell, for plaintiff in error. 1. The power exercised by the aldermen in passing the ordinance complained of was unlawful, and not within the scope of their authority under the charter of the town; and therefore the corporation was in nowise responsible for such ordinance. The aldermen alone, as private citizens, are amenable to any one injured by their unauthorized act. Every such body as the aldermen of this town, having authority specially defined, act at their peril; and if they exceed the scope of their authority, they make themselves trespassers. 2 Hill. on Torts, § 5; *Blood v. Sayer*, 17 Vt. 609; *Cable v. Cooper*, 15 Johns. 157; *Smith v. Shaw*, 12 id. 257. Corporations must legislate within the scope of the authority granted them, or the legislation will be void. 1 Dill. on Mun. Corp., § 55, and notes thereto. Aldermen of the town are *quasi* civil officers of government, and as such are liable for any oppression, or any abuse of trust; and if injury arises therefrom, an action is maintainable. *Cantine v. Clark*, 41 Barb. 629; *Henly v. Mayor, etc.*, 5 Bing. 107; *Ready v. Mayor, etc.*, 6 Ala. 327.

2. The passage of this ordinance by the aldermen, without the participation, and against the protest of the mayor, and without authority of the charter, is *prima facie* evidence of malice, a fraud on the rights of the mayor, and a gross abuse of office. *The Commonwealth v. Rodes*, 6 B. Monr. 171. The malice in such cases, intended by law, does not necessarily mean actual malice, but may be inferred from a gross abuse of charter powers. 2 Hill. on Torts, ch. 28, § 12. Officers of municipal corporations are liable for torts. 1 Dill. on Mun. Corp., § 176; *Osgood v. Blake*, 1 Fost. 550; *Perry*

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v. *Buss*, 15 N. H. 222. Officers of a corporation passing an ordinance not within the scope of their powers can be sued for acts done under it. 1 Dill. on Mun. Corp., § 353. And the good faith of officers in passing such ordinance may be inquired into. *State v. Cincinnati Gas Co.*, 18 Ohio St. 262.

Benj. King, Jr., for defendants in error.

CHALMERS, J. The plaintiff, late mayor of the town of Beauregard, brings this suit against the defendants, late aldermen of said town, to recover from them, individually, damages alleged to have been sustained by him from the passage by them of an ordinance which, as he alleges, "unlawfully and maliciously deprived him of his legal rights, fees, privileges, and emoluments, and of his office of mayor as aforesaid."

It is impossible to perceive upon what theory such a suit can be maintained. If the ordinance was within the authority of the board, certainly the individual members of it cannot be made personally liable for a mistaken exercise of their powers; nor is it possible in such a case to inquire into the motives which prompted their action. By the third section of the charter of the town, the board are constituted a legislative body, and given power "to make all needful laws and ordinances for the good government of said town and its inhabitants."

It certainly cannot be argued that the motives of the individual members of a legislative assembly, in voting for a particular law, can be inquired into, and its supporters be made personally liable, upon an allegation that they acted maliciously toward the person aggrieved by the passage of the law. Whenever the officers of a municipal corporation are vested with legislative powers, they hold and exercise them for the public good, and are clothed with all the immunities of government, and are exempt from all liability for their mistaken use. 1 Am. Lead. Cas., marg. p. 653; *County Comrs. v. Duckett*, 20 Md. 469; *Borough of Freeport v. Marks*, 59 Penn. St. 253.

If, on the contrary, the aldermen of the town of Beauregard exceeded the measure of their authority in passing the ordinance in question, it was a mere *brutum fulmen*, and could not for one moment have deprived the plaintiff of any of the privileges, emoluments, or fees of his office. If he chose voluntarily to yield obedi-

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to take away a right to make that defense, already vested. Very recently the Supreme Court of Tennessee, in *Woodlie v. Towles and Wife*, reported in Memphis Law Journal of January, 1878, maturely considered the effect of the statute of that State, reviewing the antecedent cases. On the one side the proposition was expressed on the court that the expiration of the statutory time extinguished the debt, and that a subsequent promise was a new cause of action, which must be counted on in the declaration. On the other side it was contended that the new promise was but a waiver of the statute, and that the action should be brought on the original contract.

The reasoning of the court, grounded on the adjudications in that State, was that the statute did not touch the right, but operated on the remedy. The conclusion is thus stated: "The effect [of the new promise] is to restore the remedy upon the original debt, and that this original debt is the foundation of the action, and the basis of the judgment."

We are of opinion, therefore, that the statute of Tennessee, set up in the plea, operated alone on the remedy, and did not have the effect claimed for it in the plea, of extinguishing the right.

[Omitting minor questions.]

Judgment affirmed.

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(55 Miss. 204.)

Sale — who can object to fraud in.

In an action for the price of goods sold and delivered, the defendant cannot avoid payment on the ground that the sale was in fraud of the seller's creditors. (See note, p. 517.)

ACTION on a check or draft. The opinion states the facts. The defendant had judgment below.

W. H. Hardy, for plaintiffs in error.

CHALMERS, J. The instrument sued on was executed in part payment of a stock of goods sold by one Carter to the defendant, Jacobson. It was by Carter transferred to plaintiffs. Some proofs having been made tending to show that the sale by Carter to Jacob-

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son was made with the connivance of Jacobson, with intent to hinder, delay and defraud the creditors of Carter, and that plaintiffs knew, or had cause to suspect this, at and before the time when they received the paper, the court below instructed the jury that if they believed that the sale was made with such intent, and that plaintiffs knew, or had reason to believe, it before the paper was assigned to them, no recovery could be had upon it. Is this a correct enunciation of the law? Can the purchaser of property which has been sold to defeat the creditors of the seller resist payment of the price, on the ground of the illegality of the transaction, where he is in the undisturbed possession of the property sold? The question is of first impression here, but has been much discussed elsewhere. It is answered in the affirmative by the courts of last resort in New York, Kentucky, Alabama, South Carolina, North Carolina, and New Jersey, and this view is adopted in *Bumpson Fraudulent Conveyances*. *Nellis v. Clarke*, 4 Hill, 424; s. c., 20 Wend. 24; *Norris v. Norris*, 9 Dana, 317; *Walton v. Bonham*, 24 Ala. 513; *Harvin v. Weeks*, 11 Rich. 601; *Powell v. Inman*, 8 Jones, 436; *Church v. Muir*, 33 N. J. 318.

It is admitted by these authorities that the statutes of 13th and 27th Elizabeth, as well as the American statutes of frauds and perjuries, declare conveyances in fraud of creditors void only as against creditors of the grantor, but they contend that the implied validity of them, thus recognized, or rather not negatived, as between the parties, applies only to executed, and not to executory contracts. They insist that behind these statutes stands the common law, which ever placed the stamp of illegality and invalidity upon such dealings. They assert that by the common law such contracts were void as to everybody, and that the only effect of the statutes was to declare, that as to executed conveyances, they should be good between the parties, leaving them void so far as they were executory, both as to creditors and as to the parties themselves. Hence, whether the parties to such conveyances call upon them to render an executed, or to enforce an executory, contract, these courts apply alike to either demand the maxims *ex turpi causa nulla actio oritur*, and *in pari delicto potior est conditio defendentis*. They permit either party to set up the fraud, and when it has been established, they deny to either any relief.

We are unable to concur in this view. It is by no means certain that, by the common law, conveyances in fraud of creditors were

held void between the parties, and that it was only by virtue of the statutes that their invalidity was limited to the creditors of the grantors.

Though it seems to have been so regarded in *Twynes'* case, and in *Upton v. Basset*, Cro. Eliz. 445, it was denied by Lord MANSFIELD, *Cadogan v. Kennett*, Cowp. 434, by Chief Justice MARSHALL, *Hamilton v. Russell*, 1 Cranch, 316, and by Chancellor KENT, *Sturtevant v. Ballard*, 9 Johns. 339. These eminent jurists were of opinion that the English statutes of frauds were simply declaratory of the common law. Dating back, as the earliest of these statutes do, to 3 Henry VII, and 50 Edward III, before which periods there are few reported cases, the point is necessarily involved in much obscurity. It is not perceived how a settlement of it is material to the question at issue. Whatever view the common law may have taken of covinous conveyances, the statute law of England for more than 300 years, and of America since the origin of our jurisprudence, has declared that they shall be deemed void only against those whom they are calculated to injure, to wit, the creditors of the grantor.

That this applies both to executed and executory contracts seems apparent from the language of the statutes. Not only are "gifts, grants, and conveyances of lands, or of goods and chattels," which are executed contracts, embraced both by the English and American statutes, but also "bonds, suits, judgments, and executions," which are things executory in their nature. Code. 1871, § 2893. As to all of these, it is declared that, when entered into for the purpose of defrauding creditors, they shall be void "*only as against the person or persons, his, her, or their heirs, successors, administrators, or assigns, and every of them, whose debts, suits, demands, estates, or interests, by such guileful and covinous devices and practices aforesaid, shall or might be in any wise disturbed, hindered, delayed, or defrauded.*"

What sound principle demands that the fraudulent vendee shall be allowed to remain in possession of the property conveyed, and refuse to pay the price agreed on? The transaction is harmful only to the creditors of the vendor. If they do not complain—if they acquiesce—why should he be permitted to escape payment of his ill-gotten gains? There is a manifest distinction between conveyances in fraud of creditors, and offenses against the penal law. By one the body politic, the sovereign Commonwealth, is wrorgered: by the other, those only who have an interest in undoing the fraud,

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and this number is limited in our State to pre-existing creditors. As to them the transaction is void, or rather, voidable at their election. As to all others it is valid and obligatory.

Even where parties have been mutually engaged in dealings clearly illegal and prohibited by law, but which have ceased, it has been twice held in this court, after full argument and careful review of the authorities, that the one who had reaped the profits might be compelled to a settlement by his coparticipant. *Gilliam v Brown*, 43 Miss. 641; *Walker v. Jeffries*, 45 id. 160.

The views announced above are sustained in well-considered opinions by the courts of Maine, Vermont, Massachusetts, Pennsylvania, Missouri, and Indiana. The reasoning of these decisions seems to us conclusive, both upon principle and precedent. *Dyer v. Homer*, 22 Pick. 253; *Carpenter v. McClure*, 39 Vt. 9; *Telford v. Adams*, 6 Watts, 429; *Harvey v. Varney*, 98 Mass. 118; *Nichols v. Patten*, 18 Me. 231; *Moore v. Thompson*, 6 Mo. 353; *Findley v. Cooley*, 1 Blackf. 262; *Springer v. Drosch*, 32 Ind. 486; s. c., 2 Am. Rep. 356.

The fifth instruction given for defendant in the court below was not in accordance with these views, and was hence erroneous. Upon the facts in controversy the testimony was so conflicting, and apparently so equally balanced, that the erroneous charge must produce a reversal.

Judgment reversed.

NOTE BY THE REPORTER.—This question, as will be seen from the principal case, is a vexed one, and an examination of the authorities will show still greater conflict and uncertainty than appears in the case.

In *Hawes v. Loader*, Yelv. 196, it is said: "The defendant is not such a person as is enabled by the statute (13 Eliz.) to plead this plea, for the deed is made void as against all creditors, etc., but made void against the party himself, his executors and administrators, but against them it remains a good deed of gift." This case is distinguished in *Nellis v. Clark*, 4 Hill, 427, on the ground that the contract was executed, title to the goods having passed by the deed, and symbolical delivery of possession.

In *Doe v. Roberts*, 2 B. & Ald. 367, A. D. 1819, where a deed was executed to give the grantee a colorable qualification to kill game, it was held valid as between the parties to support ejectment. This is founded on *Montefiori v. Montefiori*, 1 W. Bl. 364,* A. D. 1762, where Lord MANSFIELD held a note, fraudulently given to carry on a marriage treaty, valid against the maker, saying, "No man shall set up his own iniquity as a defense any more than as a cause of action;" and on *Hawes v. Loader*, *supra*. This case was followed, without debate, in *Bessy v. Windham*, 6 Q. B. 166, the court saying: "We agree in this doctrine." In *Nellis v. Clark*, 4 Hill, 428, *Doe v. Roberts* is distinguished on the ground that legal title to property had passed by grant, and the suit was for the property; and the *Montefiori* case, upon the ground that the decision was to protect the party intended to be defrauded, namely, the wife of the plaintiff.

In *Smith v. Hubbs*, 10 Me. 71, A. D. 1833, it was held that in an action for the price of goods it is competent for the defendant to show that the sale was in fraud of the seller's

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creditors, and thus defeat the action. The court say: "There is a marked and settled distinction between *executory* and *executed* contracts of a *fraudulent* or *illegal* character. Whatever the parties to an action have *executed* for fraudulent or illegal purposes the law refuses to lend its aid to enable either party to disturb. Whatever the parties have fraudulently or illegally *contracted to execute* the law refuses to compel the contractor to execute, or pay damages for not executing, but in both cases leaves the parties where it finds them. The object of the law in the *latter* case is as far as possible to prevent the contemplated wrong, and in the *former* to punish the wrong-doer by leaving him to the consequences of his own folly or misconduct." This is a leading case, much quoted in the later decisions.

In *Nellis v. Clark*, 4 Hill, 427 in the Court of Errors, A. D. 1842, WALWORTH, Ch., says: "A sale or assignment for the purpose of delaying, hindering or defrauding a creditor in the collection of his debt was illegal at the common law and is in itself immoral and against public policy. And the transactions declaring such transactions void as against creditors are only in affirmance of the common law on that subject. The word *only*, as used in the statutes of Elizabeth, and in our Revised Statutes of 1787, on this subject, was not intended to render executory contracts of that character legal and valid between the parties thereto. But it was inserted to prevent the general provisions of the statute from changing the common-law rule as between the parties themselves in relation to executed contracts." This language and the subsequent discussion of the subject, however, would seem to be *obiter* in the chancellor's view, for he continues, at p. 430: "I think, however, that the rule that a party to an executory contract which is contrary to law or public policy, or which has been made for the purpose of defrauding creditors, cannot sustain an action upon such a contract, was improperly applied to this case. For, as I understand the facts, the note upon which this suit was brought was a good and available security in the hands of Curtis, the original payee, who was no party to the fraud between Buttolph and the defendant Clark." He was, therefore, for reversal of the judgment of the Supreme and affirmance of the original judgment. Senator RUGER agreed with him, but Senator BOCKEE differed as to the applicability of the doctrine in question. He said: "A fraudulent executory contract could not have been enforced between the parties at common law, and our statute has not altered the rule in this respect;" but he concluded that the holder of the note was not *bona fide*. This view prevailed, for the decree of the Supreme Court was affirmed by ten to nine. In the Supreme Court the doctrine laid down by the chancellor above was enunciated by COWEN, J., BRONSON, J., concurring, but KENSON, C. J., dissented, in a careful opinion concluding: "Were we to permit the purchaser in fraud of creditors to set up the intent with which the conveyance was executed as a defense to the payment of the purchase-money, the fraud could be practiced without hazard." All that would be necessary to escape it would be to extend the payment so as to insure the experiment by creditors before it became due." These decisions were thus remarked upon in *Moseley v. Moseley*, 15 N. Y. 335: "It was formerly understood to be the law that contracts and conveyances made with a view to hinder, delay or defraud creditors were nevertheless valid and binding between the parties to such contracts and conveyances. The English statute of frauds, which was early re-enacted in this State, in declaring the effect of such transactions pronounced them void and of no effect only as against the person or persons who might in any wise be disturbed, hindered or defrauded.

In *Nellis v. Clark* the rule was departed from by a decision which restricted the doctrine to executed conveyances, the court holding that an executory agreement entered into in fraud of creditors could not be enforced between the parties; conceding, however, that the principle which I have stated applied universally to grants and conveyances, and all executed contracts. The court applies to transactions fraudulent against creditors the rule which prevails as to other illegal contracts, namely, that whatever the parties have illegally contracted to execute, neither can by law compel the other to execute, or to pay damages for not executing; and that as to conveyances and other executed contracts it refuses to aid either party, but leaves them where it finds them. This modification of the law as it was finally held, having received the sanction of the Court of Errors, should now be considered as established."

In *Norris v. Norris' Adm'r*, 9 Dana, 317, A. D. 1840, the court said of the statute of frauds, it "has never been construed as having been intended to change the conserva-

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tive principle just defined. It leaves the parties still, as between themselves only, to stand on the ground of the common law. And therefore a party to an executory agreement, made to defraud purchasers or creditors, has no more right to maintain a suit for coercing the execution of it, than a party to an executed contract for the same illegal end would have to prosecute a suit for restitution or rescission."

In *Watton v. Bonham*, 24 Ala. (N. S.) 513, A. D. 1854, it was held that a grantor in a deed made to hinder, delay and defraud creditors, cannot set up his own fraud against a subsequent purchaser from him, for the purpose of showing that a good title passed notwithstanding the deed, and thus preventing the subsequent purchaser from enjoining a judgment at law on the notes given for the purchase-money. This case is therefore not exactly in point.

In *Harwin v. Weeks*, 11 Rich. 601, A. D. 1858, it was held that although an executed contract, as a conveyance of land, cannot be avoided as between the parties, by showing that it was made with intent to defraud creditors, yet in an action brought to enforce an executory contract the defendant may defeat a recovery by showing that it was made to defraud creditors. GLOVER, J., delivered an elaborate opinion, in which two others concurred, but WITHERS, J., gave a dissenting opinion, in which another concurred, and still another was absent.

The same is held in *Powell v. Inman*, 8 Jones' L. 436, A. D. 1862, the court relying on *Roberts v. Roberts*, 2 B. & Ald. 366, to sustain their view of the distinction between executed and executory contracts. The court say that this construction of the statute is necessary to give effect to the salutary maxim, *ex dolo malo non oritur actio*.

Precisely the same also is held in *Church v. Muir*, 33 N. J. L. 318, A. D. 1869. BEASLEY, C. J., relies on *Nellis v. Clark*, and criticises the dissenting opinion of NELSON, C. J., in the Supreme Court in that case. He also lays stress on the fact that equity would and does refuse to lend its aid to the execution of such contracts, and asks, "Why should a different rule prevail at law?" The decision was unanimous, but made by only four of the seven judges.

In *Fairbanks v. Blackington*, 9 Pick. 93, A. D. 1829, it was held that if a person secure property to his children in fraud of his creditors, this fraud is no defense to an action brought by the children against one who has received and agreed to account to them for the property. The court say: "Whatever fraud there was in the original transaction, it was between other parties, and in which the plaintiff did not participate. And perhaps this is a sufficient answer." They then remark *obiter*: "Another answer is, that the original transaction was not illegal. The most that can be urged against it is, that it was avoidable by creditors; but it was valid between the parties," etc. No discussion nor citations. *Dyer v. Homer*, 23 Pick. 253, A. D. 1839, is, however, an authority for the doctrine of the principal case. The court, MORROW, J., say: "Although the sale was invalid as to creditors, and might have been avoided by them, yet as between the parties, it must be deemed fair and obligatory. No man can be allowed to defeat his own contract by alleging his own turpitude. The principles of estoppel should apply in such a case with all their stringency." They lay stress on the word 'only' in the statute, as 'plainly implying that between the parties' the contracts 'are valid and operative.' And SHAW, C. J., says: "The true distinction, we think, is, that the sale is valid to all persons, except as against creditors and purchasers." "Such a transaction is not regarded as *turpis causa*, which renders all contracts void." No citations. This is followed in *Harvey v. Varney*, 26 Mass. 118, A. D. 1867. The court refer to *Nellis v. Clark* in the Supreme Court but not in the Court of Errors, and regard *Nichols v. Patten*, 18 Me. 229, as overruling *Smith v. Hubbs*. There is no discussion of the principle.

In *Telford v. Adams*, 6 Watts. 429, A. D. 1837, it was held that a contract for the sale of goods, fraudulent and void as to creditors, is binding as between the parties. "It shall be as they have chosen to make it, and they will not be heard afterward to allege that it was a mere contrivance, different from the truth and facts of the case. This rule appears to be founded on principles of public policy, and is intended to deter men from engaging in forbidden transactions, by refusing relief as between themselves, and leaving them in the position they have assumed."

To the same effect is *Findley v. Conley*, 1 Blackf. 262, A. D. 1823. The court said, that by the common law, and the statute of Elizabeth, conveyances in fraud of creditors were not

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absolutely void, but have always been considered binding between the parties; that whether that statute is merely declaratory or an extension of the common law is unsettled, but not involved in the case, but that there is not a dictum that it is in derogation of the common law; that the Indiana statute, which simply enacts that such conveyances to defraud creditors "shall be null and void," is not inconsistent with their validity between the parties, and has not changed the law. This case was denied in *Nellis v. Clark*, 20 Wend. 80.

Morre v. Thompson, 6 Mo. 353, A. D. 1840, simply decides that in an action on a note by payee against maker, an allegation of fraud in the note between the parties and a stranger, to defeat creditors of the latter, is foreign to the issue.

The doctrine of the principal case is sustained by *Carpenter v. McClure*, 20 Vt. 2, A. D. 1866, the court saying, "In no English case, and in but two American cases which have been brought to our notice, has the distinction which is urged here by the defendant between contracts performed and unperformed, with regard to this statute, been taken." Referring to *Nellis v. Clark* and *Smith v. Hubbs*. "A note cannot fairly be held void only as to creditors, if it stands, like a note given to compound a felony, unenforceable as to the maker, and only effectual to prevent restitution after payment by force of its corruption and not its validity."

Nichols v. Patten, 18 Me. 281, A. D. 1841, although it does not expressly overrule *Smith v. Hubbs*, clearly sustains the principal case, founding upon the early New York and Massachusetts cases and *Hawes v. Leader*, Oro. Jac. 270.

In *Starke's Ex'rs v. Littlepage*, 4 Rand. 368, A. D. 1836, it was held that where the policy of the law requires that a fraudulent or vicious conveyance should be enforced, the maxim *in pari delicto* does not apply; and so, where a debtor makes a fraudulent conveyance of his property to protect it from the claims of creditors, the fraudulent grantee may enforce the conveyance in a court of law, and the debtor will not be allowed to defeat the claim by alleging the fraud. By two judges out of three.

In *King v. Lyman*, 1 Root, 104, it was held that intermeddling with goods conveyed by a fraudulent bill of sale of a decedent will not subject a man as executor *de son tort*, and the court say, "It is good and valid as between the parties." No discussion nor citations.

In *Randall v. Phillips*, 3 Mass. 888, A. D. 1824, STORY, J., speaking of such a conveyance, says: "It is not a mere nullity. It is good as between the parties, and binds them and their privies. It may be avoided by any third persons whose interests are intended to be defeated by it, but it is not absolutely void. The general doctrine is that a conveyance in fraud of the law binds parties and privies, and cannot be acted upon, so far as respects them, as a nullity."

Chitty (Cont. 363) says: "Such a transfer is good between the parties thereto." Bump (Fraud. Conv. 442) says the statute was designed solely to protect the rights of creditors, and making no provision as to the effect between the parties, leaves it to the common law; and as a conspiracy to defraud creditors is an offense against good morals, common honesty and sound public policy, the maxim *in pari delicto* applies as to an action to recover the property. He also approves the doctrine of *Nellis v. Clark*.

Compare note, *DeLeon v. Trevino*, ante, p. 106. It will thus be seen that the principal case is well supported by authority. Indeed, there is a considerable numerical preponderance of States in its favor, and considering the English doctrine and the great authority of Massachusetts, and the almost equal division of the judges in *Nellis v. Clark* in this State, it must be confessed that upon authority the case is well decided. In principle, also, the reasons for its doctrine are very cogent. But the question can hardly be said to be well settled.

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(55 Miss. 479.)

Insurance — stipulation that agent procuring insurance shall be deemed agent of insured.

A stipulation in an insurance policy, that any other person than the insured, who may have procured the insurance to be taken, shall be deemed the agent of the insured, and not of the company, under all circumstances in any transaction relating to the insurance, cannot apply to the agent who procured the application and made the contract professedly on behalf of the company, being charged with the duty of soliciting insurance, taking applications, collecting premiums, etc., by the company, which was authorized by its charter to appoint agents and define their powers.

Where an applicant for insurance makes correct answers to the questions asked him by the agent of the insurer, and the agent dictates or suggests the answers as set down, and such answers are incorrect, the fault will be attributed to the insurer, and parole evidence may be resorted to for the purpose of showing the circumstances attending the application. (*See note, p. 581.*)

ACTION on policy of insurance. The opinion states the facts. The plaintiff had judgment below.

W. S. Nugent, for plaintiff in error, relied on *Rohrback v. Germania Ins. Co.*, 62 N. Y. 47; s. c., 20 Am. Rep. 451.

Harris & George, for defendant in error.

J. Z. George, of counsel for defendant in error, argued the case orally.

SIMBALL, C. J. Wilson, the local agent of the Planters' Insurance Company, in Bolivar county, solicited and procured Myers to effect the insurance in question in that company.

He had been regularly appointed in writing. His general duties were to solicit and procure customers, take applications for policies, collect the premiums, and forward both to the principal office at Jackson, and give binding receipts for insurance for fifteen days. To facilitate him in the business, he was furnished with printed blanks of applications, to be filled up under his supervision, which were intended to inform the company of all circumstances material to the risk. It must be assumed that Wilson was selected on ac-

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count of his supposed fitness for the employment. But he was also furnished with printed instructions respecting his duties. He was directed to publish the company as widely as possible, to canvass diligently for customers, to study carefully "the blanks and instructions, so that he would be able at once to *make out* and understand each form of application correctly." In another place he is assured that "a thorough study of the instructions and blanks will enable him to answer any question understandingly, as to the company's manner of doing business," "and he will be able to fill out the blanks rapidly and correctly." He must inform applicants that the concealment of any material fact renders the policy void.

In his deposition Wilson gave an interpretation of what he conceived to be his duty, which accords with the instructions, to wit: "It is my invariable rule to interrogate the applicant, and upon his replies, if necessary, I instruct him how to frame his answer."

The defendant below, the insurance company, contested the plaintiff's right to recover, on the ground that untrue answers were given by Myers to the questions propounded in his application for insurance.

To that the insured replied that there are no misrepresentations or concealments, but the answers are true, whether they shall be regarded as warranties, or representations of the facts pertaining to the condition, situation of the property, the incumbrances upon it, value, etc. And however that may be, they were fully disclosed to Wilson and known to him, and therefore the company are precluded from setting up that defense.

To that the company rejoins that the insured covenanted with them, that as to all such matters, Wilson should be his agent, and not the agent of the company.

The questions arise on the covenant in the application "that the foregoing, with the diagram thereon, is a full and true description and warranty of the condition, situation, risk, and value of the property on which the insurance is applied for; and which shall form the basis of this policy. * * * And I, the applicant, do hereby further agree that the policy of which this application is the basis, and which will be issued thereon, shall be accepted by me, with the express understanding, that if the note or notes given for the premium * * * shall be unpaid at the time of any loss, the policy shall be considered null and void." And also the fourteenth condition printed on the back of the policy, to wit: "It

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is part of this contract that any person other than the *assured*, who may have procured this insurance to be taken by the company, shall be deemed to be the agent of the assured, * * * and not of this company, under any circumstances whatever, in any transaction relating to this insurance."

The verbiage of this condition is not candid ; it seems to have been used with studied design to obscure the real purpose. It is a snare set in an obscure place, well calculated to escape notice. It is not written or printed on the face of the policy. It is not so much as alluded to in the application ; nor is the agent, in his printed instructions, enjoined to inform those with whom he treats of it.

The average man of the community, the layman, interested in such a policy, after carefully reading it over, may well be supposed to hold this soliloquy :

"What does this mean? Who is the other person referred to, who might have helped to procure the insurance? I called in no friend to aid me with advice. No one was engaged about it, except the agent and myself. Surely the allusion can't be to him, for he acted for and represented the company. If he were meant, the language would have pointed unmistakably to him."

The covert meaning is that Wilson (and all others in his position), in any thing done or said by him in procuring the insurance, "shall not in any circumstances whatever, or in any transaction relating to the insurance," be the agent of the company, but the agent of the assured.

Wilson was constituted agent for the company. The charter expressly authorized the Planters' Insurance Company to appoint agents and define their duties. Acts 1874, p. 138. There is no pretense that Wilson ever surrendered his trust, or that the power was ever revoked.

If he could by stipulation be converted into an agent for the assured, he must be held as also the agent of the company; for in that capacity he professed to deal with Myers. It would be difficult for him to represent both parties as agent, touching the same subject-matter.

Ostensibly he acted for the company in soliciting risks to be taken by it, in receiving and transmitting premiums, and in delivering policies. He was supplied with the requisite forms, and in effect, was instructed to aid applicants to fill them up. On well-

settled principles, he was competent to bind his principal within the legitimate range of his employment. He appeared before the public as their trusted and accredited attorney in fact. It is fair to presume that he had their confidence, and that they indorsed his skill and qualifications.

Surely credulity cannot be imputed to the public if they accepted and treated with Wilson as the representative of the company within the pale of his employment, and believed (unless his authority was restricted) that he could well do all things within the line of his duties which the company themselves could do. If his powers were restricted within narrower limits than the nature of his business would indicate, it was incumbent on the company to give notice to those who negotiated with him. Therefore, the propriety of the enunciation in *Insurance Company v. Mahone*, 21 Wall. 156: "That the acts and declarations of the agent are to be considered as the acts and declarations of the insurer, and the applicant was justified in so understanding them."

Why justified in that conclusion? Because he purported so to act, and was held out to the public in that character by his principal; and the assured had no knowledge of private restrictions, if there were any. It is the suggestion of morality and reason that parties should deal with each other in the characters which they assume.

The fourteenth condition under review is extraordinary; whilst holding on to Wilson as the company's agent, it exacts a covenant from the assured that in all things concerning procuring the insurance, and in all circumstances relating to the insurance, he is the agent of the assured. The object is, plainly, to relieve the company from all responsibility for the acts and declarations of their agent, and to make the assured take the risk of his errors and mistakes.

We do not say that the company could not restrict the apparent and ostensible authority of its agents. It might be altogether fair and reasonable to write or print in the application, with which the agents were supplied, a notice that the company, in taking risks, would be governed exclusively by the surveys and answers to the written interrogatories, and not by any verbal answers given to the agents, or information imparted to him, unless *written in the application*. That would give notice to customers that the consequences of erroneous answers, or concealments of matters material to the risk, not disclosed in the written application, rested on them, and on them alone. In such circumstances, ordinarily pru-

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dent men would seek the advice and assistance of those who were skilled in such matters.

Counsel for the respective parties have directed much of their arguments to the question whether the statements of Myers, as to the condition, situation, title, and incumbrance, are warranties or representations.

[Omitting these.]

We think in this case that Myers is bound by his statements, as representations, and not as warranties. But whether the one or the other, is not material in the view we have taken of the questions contested.

There are two lines of decisions in the books, which pursue divergent lines. The one holds that parol testimony is inadmissible to show the participation of the agent in the preparation of the application — as, that correct responses were made to the interrogatories, but on the suggestion of the agent, an incorrect result of such responses was written down by the agent, or the applicant at his dictation. These decisions rest on the idea that the object and effect of the testimony is to vary or contradict the written contract. Such were the earlier cases in New York and many other States. That doctrine is still adhered to in Massachusetts, Rhode Island, and Virginia, and perhaps in some other States.

The other class, of later origin, rapidly increasing in numbers and favor, declares that insurance companies constituting local agents to canvass for business, take and forward applications, collect premiums, and give binding contracts of insurance for fifteen days, pending applications (such agents as Wilson), must be held responsible for the acts and declarations of the agents, within the scope of the employment, as if they proceeded from the principal.

The general rule, settled by many authorities, is that the insurers cannot take advantage of the omission or misstatement of any fact which it was their duty to state correctly; and this is true when the defect occurs in the application for insurance, prepared by themselves, or any one by them authorized, with a knowledge of all the facts. *Rowley v. Insurance Co.*, 36 N. Y. 550; *Peck v. N. L. Ins. Co.*, 22 Conn. 575; *Beebe's case*, 25 id. 51; *Franklin's case*, 42 Mo. 457; *Beal v. Park Ins Co.*, 16 Wis. 241.

In *Malleable Iron Works v. Insurance Company*, 25 Conn. 465, the court said of an agent (equipped for business as was Wilson), that he had an implied power to explain the questions and the answers

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required, and that his error or omission could not be given in evidence as a breach of warranty by his principals. *Beal v. Park Ins. Co.*, 16 Wis. 241; *Plumb v. Cattaraugus Ins. Co.*, 18 N. Y. 392; *Rowley v. Empire Ins. Co.*, 36 id. 550; *Moliere's case*, 5 Rawle, 342; *Ayer's case*, 21 Iowa 185.

In the American Leading Cases, the annotation to *Carpenter's case*, after a collation and review of the authorities, states this result: "Where the business of the agent is to solicit for his principal, and procure customers, and he misleads the insured by a false erroneous statement of what the application should contain, or, taking the preparation into his own hands, procure his signature by an assurance that it is properly drawn, the description of the risk, though nominally from the insured, *ought to be regarded as proceeding from the company.*" *May's case*, 25 Wis. 306; *Schetter's case*, 38 Ill. 166; *Ins. Co. v. Wilkinson*, 13 Wall. 236; *Insurance Co. v. Mahone*, 21 id. 152.

If the insurers assume the preparation of the contract, they cannot take advantage of the failure of the instrument to express any fact or circumstance that has been duly communicated by the insured, and omitted by negligence, mistake, or design by their officers or agents. The principle equally applies when the error or misdescription is in the application, if it was prepared or dictated by the agent. *Beal v. Park Ins. Co.*, 16 Wis. 241.

These cases, and others that might be cited, deny the *applicability* of the rule excluding parol testimony which varies or contradicts a written instrument, and place its competency on another ground, namely, "where one party has by his representations or conduct induced the other party to the transaction to give him an advantage which it would be against equity and good conscience for him to assert, he will not be permitted, in a court of justice, to avail of that advantage." The courts apply the doctrine of equitable estoppel, so beneficial and just when properly used.

It would seem, that strictly, the more appropriate remedy would be a suit in chancery to reform the contract. Those courts that reject the parol evidence, in the great majority of cases, would relieve in that mode. But as we have seen, the tendency is to attain the same result at law, by allowing the truth to be proved by parol, and giving to it the force of an estoppel *in pais*.

Whether the disclosures of the assured are made warranties or representations is immaterial. The testimony shows what answers

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were given to the interrogatories to the agent. They bring to his notice the actual facts. If the agent writes down or dictates an erroneous deduction or result, he assumes for his principal that it is true, or that it is the equivalent of the verbal disclosure. The assured would be regarded as declaring to the insurer, "if the answer, as written, is your understanding of the facts disclosed to your agent, then I am bound by them as 'warranties,' or as representations, as the case may be." *Ins. Co. v. Mahone*, 21 Wall. 152.

If this were a suit in chancery for reformation of the contract, that court would esteem the verbal statements of Myers, in answer to the interrogatories, as incorporated into the contract, and decree accordingly, if there were no other objections. A court of law would reach precisely the same end, by putting the insurer under an estoppel to insist on a breach of the warranty, or the untruth of the representation. It is but another addition to the numerous instances where courts of law have borrowed principles from the equity courts, and adopted and enforced them. Nor should any limitation be put upon the naturalization into the common law of equitable principles, when its methods of procedure and forms of action are adapted to render complete justice.

In *Chase v. Insurance Company*, 20 N. Y. 54, there was a stipulation in the application (which we have before characterized as reasonable); it was, "That the company would not be bound by any act done, or statement made, to or by any agent, or other person, not contained in the application."

In the later case of *Rohrback v. Germania Ins. Co.*, 62 N. Y. 47; s. c., 20 Am. Rep. 451, literally the same covenant as in the case before us was sustained. It had been condemned by the Supreme Court of New York.

Its inevitable effect is to greatly weaken the indemnity on which the assured rely. It is inconsistent with the acts and conduct of the insurance companies in sending abroad all over the land *their agents and representatives* to canvass for risks. It is an effort by covenant to get the benefits and profits which these agents bring them, and at the same time repudiate the relation they sustain to them, and to set up that relationship with the assured, and that, too, without their knowledge and consent. It is not a limitation or restriction of power, but the dissolution of the relationship with themselves, and the establishment of it between other parties.

This fourteenth condition attempts a logical and legal impossi-

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bility. It converts the agent of one into the agent of both. He deals with the subject-matter for both contracting parties. He is instructed by the company to study his documents and papers, so that he can "readily fill up the blanks;" he can negotiate for the company for high rates of insurance, and at the same time his duty to his other principals is to cheapen the rates. It places the agent in an inconsistent and antagonistic position. On the other hand he must ply the people to insure, extend and increase the business and the profits of the company, and thereby put money in his own purse. But in doing all this, if he blunders and makes mistakes, for these he is the agent of his customers, and with them is the responsibility.

If he waives a forfeiture by extending the time for the payment of a premium note, it would be a grave question whether he represented the company or the assured. If the latter, there would be no waiver at all. The complications would be intricate, and almost inexplicable.

Whilst we cannot sustain this condition, we repeat that it is entirely legitimate for the corporation to limit the powers of its local agents. But if they choose to do so, those with whom they do business ought to be informed of it.

We adopt the doctrine of those cases which hold, that if the agent takes charge of the preparation of the application, or suggests or advises what shall be answered, or what will be a sufficient answer, the company shall not avoid the policy because they are false or untrue, if full disclosures were made by the applicant to him.

We come now to consider whether there are any false representations or concealments that should avoid the policy.

[Omitting these questions.]

Not to pursue the subject into further detail, it has been clearly proven that Wilson actively participated in the preparation of the application, dictated the most material answers complained of as erroneous, and approved and consented to all of them as statements of the truth, especially within the rule laid down in *Insurance Company v. Mahone*, 21 Wall. 152, and the other cases hereinbefore cited. The company is estopped to deny the truth of the answers in the application, and cannot make the defense that the statements of the assured therein are misrepresentations, so as to avoid the policy.

Judgment affirmed.

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CHALMERS, J., concurring. It is said in the opinion of this court (delivered by myself) in *Co-operative Association v. Leflore*, 53 Miss. 1 (on page 16), that "it is well settled that all stipulations and conditions contained in the body of an insurance policy are warranties, to the absolute truth of which the parties have pledged themselves." As written, the sentence is erroneous. By some carelessness of the writer the words "*prima facie*," before the word "warranties," were omitted, as is apparent by reference to the citation from Bliss on Life Insurance, § 55, from which the statement was taken. It was intended to state that such conditions and stipulations are, *prima facie*, warranties.

In the case at bar, the fourteenth condition printed on the back of the policy seems intended to declare that in every thing relating to the effecting of the insurance the agent who procures it shall be deemed the agent of the insured, and not of the insurers. As thus stated it involves a legal contradiction. The agent binds the company, temporarily at least, by the reception of the premium, and this he could not do if he was wholly the agent of the insured and in no manner that of the insurers. A man cannot bind others by a contract between himself and his own agent.

I see no difficulty, however, in constituting him the agent of the company for some purposes, and of the applicant for others. For instance, the company might well stipulate that if its agent took part in filling out the application he should be regarded *pro hac vice* as the agent of the applicant, and that neither his acts in so doing nor any information communicated to him should bind them unless transmitted to them by the writing, and by them approved. Such a stipulation, to be binding, should be made known to the applicant in plain and unmistakable language. Good faith would prompt that it should be communicated at or before the making of the application, though I will not say that this would be essential. Because the fourteenth condition on this policy was so ambiguous as to be almost unintelligible, I hold it to be unfair, and therefore invalid.

The fourteenth condition being stricken out, I consider it wholly immaterial whether the statements contained in the application be regarded as representations or warranties. The truth as to all the matters inquired about was communicated to the agent of the company. He dictated or suggested the answers which are now complained of as false. His acts, in so doing, were the acts of his

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principals. Whether the statements were representations or warranties, they were made to embody untruths, by the insurers themselves, acting through their agent. A man is no more bound by a false warranty into which he has been entrapped by the party with whom he is dealing than by a false representation.

The principle which relieves the insured in this class of cases is the same that authorizes courts of equity to reform written instruments by parol proof, so as to make them conform to the real contract between the parties. It applies as well to covenants and warranties as to other contracts.

NOTE BY THE REPORTER.—See to same effect, *Gans v. St. Paul F. & M. Ins. Co.*, 48 Wis. 108; 8. C., 28 Am. Rep. 535; and see also note, 26 Am. Rep. 370. In *Union Ins. Co. v. Chipp*, Illinois Supreme Court, Nov. 17, 1872, similar doctrine to that of the principal case was held. The following is an abstract of the decision:

Under a condition in a policy of insurance, that "if the interest of the assured in the property be any other than the entire, unconditional and sole ownership, it must be so represented to the company and so expressed in the written part of the policy," otherwise the policy to be void, it was held, even if the assured was not vested with the "entire, unconditional and sole ownership" of the property, yet if the real character of the title was known to the officers of the company, and the company, having such knowledge, chose to assume the risk, it would be liable, in case of loss, notwithstanding the nature of the title was not expressed in the written part of the policy. The company having knowledge of the nature of the interest claimed by the assured, and he not being present, it was the duty of the policy clerk acting for the company to have expressed the nature of that ownership in the policy. Where insurance is procured to be taken by a soliciting broker, who was in fact acting as the agent of the company, declarations and explanations made by the assured to such agent, concerning the character of the ownership of the property, will be notice to the company, and this notwithstanding there be a condition in the policy that such broker shall be deemed the agent of the assured and not of the company.

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(55 Miss. 597.)

Partnership — transfer by one partner of firm assets in payment of his individual debt.

As against a general creditor of a solvent partnership, one of the firm, with the consent of his copartners, may in good faith make an absolute transfer of the entire partnership assets in payment of his individual debt. (See note, p. 534.)

THE opinion states the case.

Dabney & Cotton, for plaintiffs in error. A transfer of firm property to pay the individual debts of a member of the firm is a

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voluntary conveyance, without any valuable consideration, and is void as to the existing partnership creditors. *Stegall v. Coney & Rice*, 49 Miss. 761; *Williams v. Gage*, id. 777; Bump's Fraud. Conv. 227, 381. Partnership property is held by the members thereof in trust, first, for the benefit of creditors; second, for each other and their representatives. *Robertshaw et al. v. Hanway*, 52 Miss. 713. The individual interest of the members of a partnership cannot be ascertained until the firm debts have been fully paid, and the assignment of the interest of a partner passes no more than what may remain after the partnership creditors have been paid off. *Gaines & Stegall v. Coney & Rice*, 51 Miss. 323; *Williams v. Gage*, 49 id. 777.

Nugent & McWillie, for defendants in error.

CHALMERS, J. Harney and Washington were partners in a liquor saloon, the former having contributed the capital, and the latter his services. Harney, having become indebted to Odeneal, transferred to him in part payment of the indebtedness, and with the knowledge and consent of Washington, the entire business and stock of the partnership. Odeneal subsequently took in Currie as a partner, and the business was continued under the style of S. D. Currie & Co. The debt of Harney to Odeneal, which formed the consideration of the transfer, was the individual debt of Harney, for which neither Washington nor the firm of Harney & Washington, as a firm, were in any way responsible; but Washington assented to and acquiesced in the sale. After the sale, Schmidlapp & Bros., creditors of the firm of Harney & Washington, sued out a writ of attachment against them, and caused the same to be levied on their former goods, in the possession of S. D. Currie & Co., upon the ground that the transfer of the firm goods in satisfaction of the individual debt of one of the partners was fraudulent and void as against firm creditors.

Is the principle assumed a sound one? Is it true that partnership assets cannot, by the act or assent of all the partners, be assigned in liquidation of the private debt of one of the members, so as thereby to defeat the claims of firm creditors? The authorities on the question are divided, and in Bump on Fraudulent Conveyances it is broadly stated that such conveyances are voluntary, and void as to firm creditors; but it is doubtful, from the cases cited, whether the author is alluding to transfers made by one partner

alone, without the assent of his copartners, or whether he embraces assignments participated in by the entire firm. If the former, the proposition is indisputable; if the latter, we think the sounder reasoning and the weight of authority are against him. We speak of cases like the present, where there is no pretense of actual fraud and where there is no showing that the firm was at the time insolvent, though, according to some of the cases, the insolvency of the firm would not affect the result.

The firm creditors at large of a partnership have no lien on its assets, any more than ordinary creditors have upon the property of an individual debtor. The power of disposition over their property, inherent in every partnership, is as unlimited as that of an individual, and the *jus disponendi* in the firm, all the members co-operating, can only be controlled by the same considerations that impose a limit upon the acts of an individual owner, namely, that it shall not be used for fraudulent purposes. So long as the firm exists, therefore, its members must be at liberty to do as they choose with their own, and even in the act of dissolution they may impress upon its assets such character as they please. The doctrine that firm assets must first be applied to the payment of firm debts, and individual property to individual debts, is only a principle of administration adopted by the courts where from any cause they are called upon to wind up the firm business, and find that the members have made no valid disposition of, or charges upon, its assets. Thus, where upon a dissolution of the firm by death or limitation or bankruptcy, or from any other cause, the courts are called upon to wind up the concern, they adopt and enforce the principle stated; but the principle itself springs alone out of the obligation to do justice between the partners. The only way to accomplish this is to so marshal the assets that property which was owned in common shall be applied to the joint debts, and that which was separately owned shall be applied to the liabilities of its separate owner; so that neither class of creditors shall be allowed to trespass upon the fund belonging to the other, until the claims of that other shall have been satisfied. This right of the creditors is, therefore, really the right of their debtors; and inures to them derivatively from the debtors. Hence it is said that the lien or *quasi-lien* of the creditor "is worked out through the partners;" the meaning of which is that the firm creditors may demand the primary application of the firm

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assets to the payment of their debts, because each one of the partners would have a right to demand this as against his copartners. It must follow, therefore, that if at a time when the firm was still in existence, when no legal liens of any sort had attached, when it was neither bankrupt nor contemplating bankruptcy, all the members have agreed to a particular disposition of its assets, and that disposition is neither colorable nor fraudulent—that is to say, is upon a *bona fide* consideration, and reserves no benefit to the grantors—inasmuch as none of the partners can be heard to complain of such disposition, so none of the creditors of the firm, or of the individual members composing it, can question or attack it.

Conceding, as all the authorities do, that the firm creditors had no independent right to demand to be first paid, but derive that right solely through and under the right which the partners have to insist that this shall be done, it is impossible to see how the rule can be enforced where all the members of the firm have, before the dissolution, and without any ground to suspect fraud, given to the assets a different direction.

While some courts of high repute have taken a different view, we confess our inability to escape the logic of this proposition.

The courts of New York, New Hampshire, Illinois, and perhaps other States, seem to have taken a different view of the question.

In consonance with our view are the following, among other authorities: *Whitton v. Smith*, Freem. Ch. 231; *Freeman v. Stewart*, 41 Miss. 139; *Carter v. Beaman*, 6 Jones' L. 44; *Rice v. Barnard*, 20 Vt. 479; *National Bank v. Sprague*, 20 N. J. Eq. 14; *Allen v. Centre Valley Co.*, 21 Conn. 130; *Sigler v. Knox County Bank*, 8 Ohio St. 511; *Ex parte Ruffin*, 6 Ves. 119; *Campbell v. Mullett*, 2 Swanst. Ch. 553.

Judgment affirmed.

NOTE BY THE REPORTER.—The precise state of facts in this case seems very rarely to have arisen. In nearly all the cases sales by one partner have been confined to his own interest, or the firm have been insolvent, or the sale has been without the assent of the copartners, or the proceeds have not been applied to his own debt. To review the cases cited in the opinion:

Whitton v. Smith, Freem. Ch. 231. Here one partner, without the other's knowledge, sold the entire stock and invested the proceeds in land. It was held that this terminated the partnership, although the articles stipulated for a longer continuance, and created a joint tenancy between the former partners in the land. The court observe: "One of the undisputed canons of the law of partnership is the right of each partner to sell the whole partnership property, if the sale be free from fraud on the part of the purchaser, and such a sale terminates the partnership relation."

Freeman v. Stewart, 41 Miss. 138. In this case it was held that where a partnership is dissolved by death the partnership creditors have a *quasi* lien in equity upon the partner-

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ship effects, but only as a derivative and subordinate right under and through the lien and equity of the partners. The court say: "But then the equities of the creditors are to be worked out through the medium of that of the partners." The point decided is, that "as to the separate estate of the deceased partner, at law the creditors have no remedy."

Carter v. Beaman, 6 Jones' L. 44. This case simply held that one partner might pay his individual debt by offsetting a demand of his firm against his creditor when it appeared that such was the habit of both partners. "Fraud is repelled," said the court, "when it appears that the other partner assented to the transaction," and this assent might be inferred from the course of dealing manifested by the entries on the books.

Rice v. Barnard, 20 Vt. 479. Here it was held that the right of partnership creditors to a preference over creditors of individual members of the firm in the distribution of partnership property is wholly dependent on the right of the individual partners to enforce a lien upon the partnership funds for the payment of the partnership liabilities before individual debts; and if the contract of partnership be of such a nature that the copartners can enforce no such right, as between themselves, the partnership creditors can claim no such preference. This doctrine was applied to a case where the partners for years drew each what he chose without any account being kept and without any settlement, and the arrangement was held not to constitute a partnership but a tenancy in common.

In *National Bank v. Sprague*, 20 N. J. Eq. 14, it was held that partners have the power while the partnership assets remain under their control to appropriate any portion of them to pay or secure their individual debts, and except in contemplation of insolvency a mortgage given by them to secure individual debts fairly due is not rendered void by the fact that it operates to give such debts a preference over debts of the firm. In this case the firm were unable at the time of the mortgage to pay their debts in full, but the mortgage of nearly all their property was made in good faith to enable them to continue and redeem their position, and the mortgage was sustained.

In *Allen v. Centre Valley Co.*, 21 Conn. 180, it was held that though the creditors of a partnership are entitled to a priority of payment, as between them and creditors of an individual partner, out of the partnership funds so long as they continue partnership funds; yet they have no specific lien thereon, and while the partnership remains and its business is going on, whether it is in fact solvent or not, there is no legal objection to a distribution of the partnership funds among the members of the firm, or a *bona fide* change of them from joint to separate estate. The court observe: "The partners have the lien, and especially the solvent ones, and have a right to insist that the joint funds shall pay the joint debts, and in this way and by enforcing the equities or lien of the partners the creditors of the copartnership come to their rights, whatever they are, and thus these rights are worked out, as the authorities say." Citing *Ex parte Ruffin* and *Campbell v. Mullett* *infra*.

The same general doctrine was held in *Stigler v. Knox County Bank*, 8 Ohio St. 511, where the precise point adjudged was, that where a creditor of a firm and of one of its members, with the assent of all the partners, bought of the firm, in good faith and at a fair price, goods to the amount of such joint and separate indebtedness, though with knowledge that the firm was insolvent in the popular sense of the term, such purchase is not fraudulent as against other creditors of the partnership. The court said: "Nor is it denied but that in ordinary cases, the partners all assenting thereto, a valid appropriation may be made of the joint assets to the separate debt of one of the firm. The creditors of partnership merely as general creditors have no lien on the joint assets of the firm." "The right to have the joint assets applied to the joint liabilities, to the exclusion of the separate creditors, is the personal right of the partners themselves."

In *Doner v. Stauffer*, 1 Penn. 198, the general doctrine as to the equity of the partnership was recognized, and applied to the case of a separate creditor of both partners selling on execution the partnership effects on separate judgments against each to the same purchaser. The last sale carried all the partnership interest as against the demands of partnership creditors. The court queried what would be the effect if the respective shares had been bought by separate purchasers. This was pronounced *obiter* in *Mcneagh v. Whitwell*, *infra*.

In *Coover's Appeal*, 29 Penn. St. 9, the same general doctrine was recognized. The court said, *obiter*, that the right of the partners to insist on the application of the partnership

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property to partnership liabilities is waived by his sale of all his interest, and the effect is the same where the several interests are sold on several executions. This is treated as *obiter* in *Menagh v. Whitwell*, *infra*.

In *Schaffer v. Fithian*, 17 Ind. 463, it was held that a conveyance by partners, through a third person, to their wives in payment of money lent by them to their respective husbands, was valid as against creditors of the partnership. This was during the continuance of the partnership, the partners having then the right, the court said, to dispose of their property as they please, and the equity of partnership creditors arising only in the distribution of the partnership effects on dissolution by death or bankruptcy.

In *Hapwood v. Cornwell*, 48 Ill. 64, it was held that where one partner sells his entire interest to his copartner, and the latter appropriates it to the payment of his own individual debt, the transaction is valid as against copartnership creditors, although the purchase was made to enable the purchaser so to transfer the property. The court say, in substance, that the equity of partnership creditors only exists where the superior lien of the partners has not been surrendered. "Thus if all the members of a firm agree to the appropriation of firm property in payment of an individual debt, due from one of the members, the creditor would take the property discharged of any claim on him of the partnership creditors, and this because the members of the firm have expressly parted with their lien, and the creditors have none except through the partners."

In *Stokes v. Stevens*, 40 Cal. 391, one partner in good faith sold partnership property in payment of his individual debt. A creditor of the firm attached it, and in an action of replevin therefor brought by the purchaser, the court held that if the other partner consented to the sale, the legal title passed, and in support of a judgment for the plaintiff the court presumed such consent.

In *Kimball v. Thompson*, 13 Metc. 283, one partner, with the consent of the other, sold one-half the firm effects to a third person. The other partner afterward sold the other half to the same person. *Held prima facie* valid against all the world, and only to be set aside by creditors of the firm proving it to be fraudulent as against them. The decision is only to this extent, the court not undertaking to define what facts would render the transfers fraudulent as to the firm creditors, and the case not showing the facts.

In *City of Maquoketa v. Willey*, 35 Iowa, 323, it is said: "Partnership creditors have no lien upon the joint property for the payment of their claims. While the firm is in existence such property may be sold, and will be followed by no claim in law or equity of the creditors of the firm. The partners are free to dispose of it as the property of individuals may be disposed of, and one of them may become its separate owner. The disposition may be made pending or upon an arrangement for dissolution, and as the partners may then sell their property to one another, so may they transfer it to one of themselves from any equity of the joint creditors." In this case one of the partners sold his interest to the other on the latter's assuming the firm debts, and it was held that firm creditors had no priority of right to it in the hands of the remaining partner.

In *Parish v. Lewis*, Freem. Ch. 299, the same doctrine was laid down, and it was held that a sale of the stock in trade by one partner to another puts an end to the equity of the partnership creditors, and the joint property thereby becomes the separate property of the purchasing partner, and is not liable in his hands to the claims of the joint creditors.

In *Ex parte Ruffin*, 6 Ves. Jr. 119, it was held, that on a fair dissolution of a partnership, one retiring and assigning the partnership property to the other, and taking a bond and covenant of indemnity against the firm debts, the other continuing separately in trade a year and a half and then becoming bankrupt, joint creditors had no equity attaching upon partnership effects remaining in specie. In his note to this case Mr. Sumner says that the equity of the partnership creditors is only worked out through the rights of the partners as against each other, "may be considered as perfectly established."

In *Campbell v. Mullett*, 2 Swanst. 551, the property in question, being money awarded to two of three jointship-owners as compensation for losses by capture, was held not

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to be partnership property. The general doctrine of the absence of lien in the partnership creditors, and the dependence of the equity on the medium of the partners, was recognized, citing *Ex parte Ruffin*. The latter case is also expressly approved in *Ex parte Williams*, 11 Ves. Jr. 3; *Ex parte Kendall*, 17 id. 526.

In *Dimon v. Hazard*, 32 N. Y. 65, it was held that when one partner retires, assigning to the other, in good faith, all his interest in the partnership property, the latter takes such property free from equities of partnership creditors, and may in like manner assign it in payment of his individual debt. This principle is also decided in *Hence v. Lawrence*, 9 Cush. 555; *Robb v. Mudge*, 14 Gray, 534; *Bullitt v. Chartered Fund*, 26 Penn. St. 108. These cases are distinguished in *Menagh v. Whitwell*, *infra*; *Armstrong v. Fahnestock*, 19 Md. 58, and *Ladd v. Griswold*, 4 Gilm. 25, and *Hagood v. Cornwell*, 48 Ill. 64, are to the same effect as *Dimon v. Hazard*.

In *Tenney v. Johnson*, 43 N. H. 144, it was held, that where differences between partners were arbitrated and an award was made that all the partnership property should pass to one of the partners, who should pay the partnership debts, such property was subject to attachment by creditors of the firm in preference to individual creditors. And in *Ferson v. Monroe*, 21 id. 462, it was held, that where partners sell the stock in trade in order that the proceeds may be applied by the purchaser to pay the individual debt of one partner for money put into the business, instead of going to pay the partnership debts, such sale is void as to creditors of the firm. The court say: "How could it relieve the case of the partnership creditor to be told that though he had lost the preference which the law gives him, by a sale contrived for that purpose, the property of the firm had not been kept from him for the use of his debtors, but had gone to another party, that as against him had not the smallest right to it?" "The law does not allow the creditor of one partner to obtain any security for his debt by prior attachment of the partnership property until all their debts are paid. But if partners could sell or assign their property to pay the debt of one partner, this rule would be successfully evaded in all that numerous class of cases where the partners might be disposed to favor the creditors of the individual partners at the expense of those who had given credit to the firm on the ground of property which they held, as a partnership fund, and which the law pledges to the payment of their debts." *Ex parte Ruffin* and *Ex parte Williams* are distinguished on the ground that a sale to one partner is on a footing of a fair sale to third persons. *Rice v. Bernard* is denied.

The question was pronounced a new one in *Menagh v. Whitwell*, 52 N. Y. 146 s. c., 11 Am. Rep. 683. Here two partners in a firm of five transferred their interests to one of the remaining three; two of the latter mortgaged their interests to secure individual debts, and the third transferred his to a stranger. The mortgages and this last transfer were consented to by the other remaining partners. It was held, that a levy for a debt of the original partnership upon the firm property in the hands of a purchaser under the mortgages was valid. The cases of *Ex parte Ruffin* and *Dimon v. Hazard* are distinguished on the ground that the purchasing partner acquires the absolute right of disposal of the firm property, because he derives title by the joint act of all the firm, and his transfer in good faith will protect his transferee from the claims of the old partnership creditors; but if he retains the property in his ownership it continues liable to the superior claim of the partnership creditors. "The question now is," say the court, "What is the effect upon the title of the firm, as between it and its creditors, of transfers by the partners severally of their respective interests to third persons?" And they concede, that "had the joint property been transferred by the joint act of all, the creditors of the old firm would have lost their quasi lien, or their right to pursue this property, unless they could impeach the transfer for fraud." And again they say: "There has been no distribution of the property among the partners, and it has not been transferred by them as partners by any joint act, or by the act of one in the name of all." This statement of the question would seem to distinguish the case from the principal case, because in the latter the transfer was in effect joint, it being a transfer of all the firm property by one partner with the consent of the other. In another point the cases distinguishable.

In *Menagh v. Whitwell* the firm seems to have been insolvent at the time of the latter transfer and the mortgages. RAPALLO, J., says: "We cannot concur in this view of the effect

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of the findings, but think that the facts found show that the firm was insolvent when the mortgages were given, and if there were any doubt upon that point, they clearly establish that the diversion of four-fifths of its properties to the individual debts of two of the partners would make it solvent." And ALLEN, J., says: "As clearly shown by Judge RAPALLO, from the facts found by the referee, and stated as favorably for the plaintiff as the evidence would permit, the firm was insolvent, and hopelessly so, except as struggling men will hope against hope, and the transfers of the partnership property for the payment of individual debts were therefore a fraud upon the creditors of the firm and void." What is said by the judges in that case upon the general question may perhaps be therefore considered obiter; at all events not applicable to the facts of the principal case. See *Phelps v. McNeely*, 66 Mo. 554; s. c., 27 Am. Rep. 378.

So far as we can discover, therefore, the principal case is universally sustained by authority except in New Hampshire.

SMITH V. SPARKMAN.

(55 Miss. 649.)

Sale — when title passes.

B. agreed in writing to buy of L. five bales of cotton weighing 480 pounds each, at 11 cents a pound. At the time the cotton was in bulk on L.'s premises, and he was to haul it to M.'s gin, and after it was ginned and packed, to haul the bales to Canton. He hauled a portion to the gin, and it was ginned and packed, but before it was hauled to Canton it was attached by a creditor of L. *Held*, that title had not passed to S.*

CLAIM of personal property. Smith, the plaintiff, attached five bales of cotton as the property of Lewis. Part was at McDonald's gin in bales, and the rest at Lewis' residence in seed. The defendant, Sparkman, filed an affidavit claiming the cotton. The opinion states the other facts. The defendant had judgment below.

Raymond Reid, for plaintiff in error.

Joseph D. Eads, for defendant in error. Where a contract of sale of a specific commodity, *in esse* and susceptible of immediate delivery, is made, the property is immediately changed, though no delivery has taken place. *Ingersoll v. Kendall*, 13 Smed. & M. 611; *Jordan v. Harris & Weeks*, 31 Miss. 258.

SIMRALL, C. J. The only question that need be considered is whether the sale of the five bales of cotton, by Lewis to Sparkman,

* See *Burrows v. Whitaker* (71 N. Y. 291), 27 Am. Rep. 42; *Hurff v. Hires* (11 Vroom, 661), 29 Am. Rep. 382; *Ferguson v. Northern Bank of Kentucky* (14 Bush, 555), 29 Am. Rep. 418.

was complete so as to vest the property in Sparkman at the time the attachment was levied. At the time of the sale, November 27, 1875, the cotton in contestation was in bulk in a house on the premises occupied by Lewis. He was to haul the seed-cotton to McDonald's gin, and after it was ginned and packed, haul the bales to Canton.

The written memorandum is in these words .

“W. A. Sparkman bought of J. R. Lewis five bales of cotton, weighing 480 lbs. each, at 11 cts. per lb., to wit : 2400 lbs., \$264.00.

“Received payment in full, 27 Nov., 1875.

(Signed)

J. R. LEWIS.”

The statute of frauds allows no contract for the sale of goods,
* * * etc., to be valid, for a price above \$50, unless the buyer shall receive part of the property, or shall pay or receive part of the price, or unless some note or memorandum, in writing, of the bargain be made and signed, etc. Code, § 2895. This section was adopted first in this State in 1857, and was borrowed from the English statute.

It has been well settled that the term “contract,” as used in the statute, includes contracts in which the sale is completed by a transfer of the property to the buyer, and the price to the seller; and also executory contracts for the future delivery of property existing in the same form in which it is to be delivered. Story on Sales, § 259, and note. The statute invalidates a large class of contracts which were good at common law. Independent of the statute, the property in a specific chattel may be transmitted from one person to another without delivery, and without payment of the price. If a time is named for the payment, reciprocal actions will lie by the buyer for the thing, and by the seller for the price. Chitty on Cont. 518; *Dixon v. Yates*, 5 Barn. & Ad. 313, 340. In *Stamps v. Bush*, 7 How. 266, decided before the adoption of the section of the English statute here, commenting on the requisites of a sale complete by delivery, the court sanctioned the rule as stated by Chancellor KENT, 2 Com. 492, viz.: “Where the terms of the sale are agreed on, and the bargain is struck, and *every thing* that the seller has to do is complete, the contract of sale becomes absolute without actual payment and delivery, and the property vests in the buyer.”

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The author must be understood as meaning that every thing must be done which by the contract is required as a condition precedent to the sale. For there is a large class of cases, especially in the later reports, which hold that the seller may engage to do something in respect of the property which the parties do not mean to be essential before the property passes. In the case cited, the "hauling of the cotton to the river bank by Stamps" was said not to be a condition of that sort. The rolling from the gin-house, and separation of the bales of cotton (the subject of the sale) from the common mass, the weighing and calculation of the price, were considered as perfecting the delivery.

The hauling of the bales to the river landing might properly have been regarded as a service to be rendered by the seller as a bailee for Bush, the buyer.

In *McKay v. Hamblin*, 40 Miss. 474, a similar service to be rendered, viz.: "To haul the cotton to Canton when required to do so," was esteemed as an act to be done by the seller as bailee, the circumstances showing that there had been a delivery (constructive), and that the commodity was left in the custody of the seller as bailee.

Jordan v. Harris, 31 Miss. 258, is another illustration of whether the act to be done must be performed before the property is vested in the buyer. "A bargain was struck for all the cotton that Young had in Slaughter's gin at 9 cents per pound (part of the price was paid down). Slaughter was directed by Young to deliver the cotton to Jordan; credit for the balance was to be given on Young's indebtedness after the cotton was ginned and weighed; the sale was complete because 'the weighing * * * was to be done merely to ascertain the balance for which Young was to receive credit on his indebtedness.'"

Much depends on whether all has been done about the property which the parties intended, and whether the commodity was *in esse* at the date of the contract, in condition to be delivered. These considerations furnish valuable tests to determine whether the contract is an absolute sale or executory.

The contract between Lewis and Sparkman meets the demands of the statute of frauds. But it was not a "contract of sale" perfect to transmit the property in the cotton from one to the other. The contract was for five bales of cotton of a certain weight. At that time Lewis did not have a bale of cotton, so far as shown by

testimony. He did have a bulk of cotton in the seed — more than enough, when ginned and baled, to fulfill his contract. It is very probable that the parties had reference to cotton to come from Lewis' crop of that year, most of which was then gathered. But they intended that Lewis should put the cotton in merchantable shape by ginning and baling.

Sparkman did not bargain for seed-cotton. At the time of the contract there was no identification and setting apart of any particular bales as those bought by Sparkman. It is quite clear that the contract, in the light of the circumstances, was executory, and that the property in the cotton was not transmitted to Sparkman by delivery before the attachment of Smith was levied.

We cannot review the instructions, because no objection to them was made when given to the jury, nor is any complaint made of them in the motion for a new trial.

We think, however, that the verdict is against the testimony, and for that reason must be set aside and a *venire de novo* awarded.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

MERCHANTS' DISPATCH AND TRANSPORTATION COMPANY V. MOORE

(88 Ill. 126.)

Carrier — when bound to carry goods to destination — when liability terminates.

The plaintiff delivered to the defendant at New York goods addressed to the consignee at Bloomington, Illinois. The defendant gave a bill of lading acknowledging the receipt of the goods thus addressed, but specifying that they were to be forwarded to "Chicago depot only." It was proved that there was no other agreement, and that the plaintiff was in the habit of shipping goods in like manner and receiving similar bills of lading. *Held*, that the presumption of an agreement to deliver the goods at Bloomington, raised by the acceptance of the goods so marked, was overcome by the express contract in the bill of lading.

A carrier transported goods to their destination, where they arrived late at night. On the arrival he placed them in his warehouse, a secure place of storage, and the next morning they were destroyed by fire without his fault. *Held*, that he was not responsible, although he gave no notice to the consignee of the arrival. (*See note, p. 543.*)

ACTION for damages for breach of contract to carry goods. The opinion states the case. The plaintiff had judgment below.

William E. Hughes, for appellant.

SCHOFIELD, C. J. It is alleged in the declaration that the plaintiff delivered to the defendant one case of goods or saddlery, of the

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value of \$400, to be carried by the defendant from New York to Bloomington, and in consideration thereof, and the reward to be paid by the plaintiff, the defendant faithfully promised to take care of said goods and carry the same to Bloomington, and there deliver the same to the plaintiff. The breach is in the usual form.

The bill of lading in evidence acknowledges the receipt of the goods from the consignors in good order, in New York, addressed to the plaintiff at Bloomington, but contains this clause: "To be forwarded in like good order (damages of navigation, collisions and fire, and loss occasioned by mob, riot, insurrection or rebellion, and all dangers incident to railroad transportation, excepted) to *Chicago depot* only, he or they paying freight and charges for the same as below."

H. W. Coon testifies that he was the agent of the defendant at New York at the time the goods in controversy were shipped; that the only contract for the transportation of the goods was that contained in the bill of lading; that he gave the consignors the bill of lading upon the receipt of the goods; that the consignors were frequent shippers of goods by defendant's line, and generally took similar bills of lading; that he had no conversation whatever with any one shipping the goods, and did not then, or at any other time, agree that the goods should be transported to any other place than Chicago, and that he had no authority to make such an agreement. This evidence does not appear to be contradicted. Accepting this as true, as we must, the presumption that would otherwise have existed of a contract to carry to Bloomington, from the acceptance of the goods for transportation marked to that point, is overcome by the evidence of an express contract to carry to the Chicago depot only. We must presume, from the fact that the consignors were frequent shippers by this line, and in the habit of receiving like bills of lading, that they were familiar with its contents, and hence, when they accepted it, knew that it obligated the defendant only to ship to the Chicago depot.

It is shown the goods were promptly shipped to the Chicago depot, and there, late in the evening, taken from the car in which they were shipped, and placed in the defendant's warehouse, a safe and secure place of storage, and on the following morning they were destroyed by the memorable fire in that city of October the 9th, 1871.

There can, therefore, be no recovery against the defendant as

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carrier. *Merchants' Dispatch Trans. Co. v. Hallock*, 64 Ill. 284; *Illinois Cent. R. R. Co. v. Friend*, id. 303; *Cahn et al. v. Michigan Central R. R. Co.*, 71 id. 96.

In the view we have taken of the evidence, the judgment must be reversed and the cause remanded.

Reversed and remanded.

NOTE BY THE REPORTER. — The doctrine of the second paragraph of the syllabus is a departure from the general doctrine, and is conceded so to be in *Cahn v. R. R. Co.*, cited in the principal case. See note, 7 Am. Rep. 591. As to what circumstances will discharge the carrier's liability, see *Mobile & Girard R. R. Co. v. Prewitt*, 46 Ala. 63; s. c., 7 Am. Rep. 586; *Rice v. Hart*, 118 Mass. 201; s. c., 19 Am. Rep. 488; *Pelton v. Rensselaer & Sar. R. Co.*, 54 N.Y. 214; s. c., 13 Am. Rep. 568; *Chicago & Northwestern Ry. Co. v. Sawyer*, 69 Ill. 285; s. c., 18 Am. Rep. 613; *Meyer v. Chicago, etc., Ry. Co.*, 24 Wis. 566; s. c., 1 Am. Rep. 207; *Fenner v. Buffalo & State Line R. R. Co.*, 44 N. Y. 506; s. c., 4 Am. Rep. 709; *Erie Ry. Co. v. Wilcox*, 84 Ill. 239; s. c., 25 Am. Rep. 451.

CARY V. CITY OF PEKIN.

(88 Ill. 154.)

Constitutional law — taxation — farming lands within a city.

Farming lands within a city are subject to municipal taxation, although they are not benefited by the objects for which such taxation is levied. (See note, p. 544.)

BILL to enjoin the collection of a tax. The opinion states the case. The defendant had judgment below.

C. J. Elliott, for plaintiffs in error.

John B. Cohrs, for defendant in error.

SCOTT, J. Complainants allege, they are the owners of farm lands situated within the corporate limits of the city of Pekin, as the boundaries of that city were established by the act of 1859, and that no portion of such lands have ever been laid off into town lots or blocks as part of the city, nor have they ever received any benefit from any public improvements carried on by the corporation, and that such lands lie a considerable distance from the improved portion of the city, and are only available and valuable for agricultural purposes. The object of the bill is, to enjoin the

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corporate authorities of the city from levying and collecting taxes upon lands of complainants for municipal purposes, and for objects in no way connected with or benefiting the lands or owners.

It is not insisted, in this case, that the court has jurisdiction to disconnect the lands of complainants from the city of Pekin, or place them without and beyond the corporate limits, by changing the boundaries of the corporation as established by law. That, it is conceded, can only be done through the legislative department.

While these lands remain within the limits of the corporation, it is obvious they must be subject to taxation for municipal purposes. The Constitution has imposed the limitation that all taxes shall be uniform, in respect to persons and property within the jurisdiction of the body imposing the same, and of course the courts have no jurisdiction to decree otherwise. However burdensome such taxes may be complainants can have no relief against them under their bill.

The decree must be affirmed.

Decree affirmed.

NOTE BY THE REPORTER.—To the same effect is *Kelly v. City of Pittsburgh*, 85 Penn. St. 170; s. c., 27 Am. Rep. 683. Also, see *Brooks v. Polk County*, Iowa Supreme Court, Dec. 5, 1879, where it is held that the right to tax depends upon the situation of the property and the peculiar facts of the case. The court said: "The land upon which the tax in controversy was levied and paid, consists of about 121 acres, and is situated in the eastern part of the city. There are no buildings upon it. It is inclosed with fences, and has been used exclusively for agricultural purposes. It is bounded on the west by Stewart's addition to the city, which is subdivided into blocks and lots, and some four or five of the streets running east and west through this addition at their east ends abut against the land in question.

"The land on the south of that belonging to plaintiffs is laid off into lots. There is a cemetery, which, from an examination of the map of the city, seems to have been taken in square from the west part of plaintiff's land. As is usual in cases of this character there is a conflict in the evidence, and it is a difficult question, even with the aid of a map, to determine whether this land should be held to be taxable within the rules established by this court in a number of cases. Indeed, adjudicated cases aid but little in the determination of questions of this character, where no two cases can be found precisely similar in their facts. As is said in *Fulton v. City of Davenport*, 17 Iowa, 404, 'Difficult as the task will be, it is apparent that every such case will have to be determined upon its own peculiar circumstances, without regard to any definite or fixed rule, and hence, doubtless the decision in some instances will appear quite arbitrary and perhaps unsatisfactory.' In that case the court adopted the following rule: 'When the proprietors of undedicated town property, being locally within the corporate limits, hold such close proximity to the settled and improved parts of the town that the corporate authorities cannot open and improve its streets and alleys and extend to the inhabitants thereof its usual police regulations and advantages without incidentally benefiting such proprietors in their personal privileges and accommodations, or in the enhancement of their property, then the power to tax the same arises. * * *

"We think the court below did not err in holding that the land of the plaintiff was taxable for city purposes within the above rule. It appears that some of the

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streets in Stewart's addition. which have their *termini* upon the west line of plaintiff's land, have been worked and improved by the city to some extent. Many of the lots in Stewart's addition have been improved by the erection of dwelling-houses thereon. Some of these buildings are situated quite near the plaintiff's land. From twenty to thirty families reside within two blocks of the west line. There is a church and one of the city school-houses within two blocks. The eastern part of the city has doubled its population in the last eight years, and Stewart's addition, as one of the witnesses expresses it, 'has had its portion of improvements.' It also appears from the evidence, that one of the plaintiffs at one time stated that he intended to divide the land into lots just as soon as he could get "big enough figures for it." These facts and others disclosed in the evidence, lead us to the conclusion that the city cannot improve its streets leading to the plaintiffs' property without incidentally enhancing its value as city property, and that the growth of the city in that direction will produce the same result."

CHICAGO PACKING AND PROVISION CO. V. CITY OF CHICAGO.

(88 Ill. 221.)

Constitutional law — statutory construction — double licence for noisome trade, when can be exacted.

A statute gave cities and villages the power to direct the location and regulate the management and construction of pork packing-houses within their limits and one mile beyond. The plaintiff carried on a packing-house in the town of Lake, within one mile of the city of Chicago, and licensed by the town. *Held*, (1) that the power to regulate authorized the requirement of a license; and (2) that the city of Chicago might legally require the plaintiff to be licensed by it, although he was previously licensed by the town.

ACTION for a penalty. The opinion states the facts. The plaintiff had judgment below.

Hitchcock, Dupee & Judah, for appellant.

Richard S. Tuthill, for appellee.

WALKER, J. The city of Chicago adopted an ordinance prohibiting any person, company or corporation within the city, or within one mile of the city limits, from engaging in the business of slaughtering animals for food or packing them for market, or rendering the offal, fat, bones or scraps thereof, or any dead animal matter whatever, or to manufacture fertilizers or glue, or the cleaning or rendering intestines, until they shall have obtained a license therefor. The second section prescribes the mode of applying for and the granting of such licenses, and fixes the sum to be paid.

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therefor at \$100 per annum. The fourth section prescribes penalties for a violation of the ordinance, and empowers the mayor to revoke the license on conviction of the person for a breach of the ordinance.

The case was tried in the court below, on an appeal from a police magistrate, on a stipulation as to the facts.

It was agreed that defendant was a corporation organized and doing business under the laws of this State, and when the suit was instituted against the company it was engaged in carrying on the kind of business mentioned in the ordinance. Its factory was in Cook county, outside of the city limits of Chicago, but within one mile of its limits, and within the town of Lake, in that county, and it then had a license from the town of Lake for carrying on the kinds of business which it was engaged in at the time, but had not applied for or received license therefor from the city of Chicago.

On this agreed state of facts, the court below fined defendant \$25 and costs, and it appeals to this court, and urges in favor of a reversal, that for various reasons the city had no power to pass or enforce the ordinance, and that the judgment is, therefore, unwarranted.

It is urged, that by the charter of 1872, under which the city is organized, there is found no authority to require a license to pursue this character of business. On the other hand, it is claimed that the 62d section of the general charter, by clauses 75, 78, 81 and 83, confers the power. The ordinance is manifestly framed under the 81st clause of that section, and the other clauses cannot be invoked to sustain an ordinance until it shall be adopted to give force to their provisions, hence we will not consider what power they confer.

Appellant contends, that in conferring police power by the act of 1872, it must be regarded as a revision of the city charter of 1867. It will be observed that this act was not adopted for the city of Chicago, but for all cities and villages of the State that might organize under or adopt it as the fundamental law of their organization, and the sole source of their power. The general assembly did not, nor could it, know that the city of Chicago would ever adopt the act as its charter. We have no right to presume, when the act was adopted, its framers had the old charter of the city in their minds, as they would had they been amending the charter under which it was then acting. They, no doubt, con-

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sidered the question as to what power might be necessary to enable it to secure the people of that city, as well as all other cities, in all of their rights as municipalities. The act being adopted not for Chicago, but for all cities adopting it, we should, in construing it, not look to the special charters of small municipalities having 1,000 inhabitants or upward, to give a construction to the general law. If we should, then a village charter would be as potent, after it became a city, in ascertaining its meaning, as the charter of Chicago; but the general law must be regarded and construed as an independent act, without reference to, or as an amendment of, all the special city and village charters of the State. This being true, the fact that the city charter of 1867 empowered the municipality, in terms, to license this character of establishments, and the general law has omitted those express terms, can have no bearing on the construction that shall be given to this latter act.

The 81st clause of the 62d section of the general law is this: "To direct the location and regulate the management and construction of packing-houses, renderies, tallow chandleries, bone factories, soap factories and tanneries within the city or village, and within the distance of one mile without the city or village limits." Does this clause, then, confer power upon cities and villages to license these establishments? The general assembly, by this enactment, assumes and virtually declares that this character of business in or near to cities and villages is noxious to the health or comfort, or both, of their dense population. And this is so certainly true, that it is believed the great mass of civilized people know it, from experience or observation. The very character and inherent nature of the business are such that the employment of most approved plans and best precautionary means is believed to be inadequate to entirely prevent these establishments from being offensive in thickly settled districts. Hence, the general assembly, acting on this assumption, has conferred upon cities and villages this broad and comprehensive power over this character of business, and it seems to be manifest that they intended to invest these bodies with ample power to regulate and control not only their management, but even the places of their location. Under this clause, a person or corporation cannot even erect, at any given place, such an establishment, without the license or permission of the city or village first obtained for the purpose, whenever they see proper to exercise the power to direct its location.

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The general assembly, no doubt, in granting this power to cities and villages, deemed it wise to make it more ample by not specifying the means they should employ to accomplish the purpose, and no doubt intended to make the power complete. Had the mode of accomplishing the end been specifically prescribed, in many of these bodies it might have proved impracticable, and the purpose been defeated. Hence we must conclude, as they were legislating for a large number of such bodies differently situated, differing in population, wealth and situation, and many other important particulars, in conferring such powers, if their exercise had been specifically prescribed it would probably have been found that whilst the prescribed mode of its exercise would have been eminently well adapted to some cities and villages, it might be entirely unsuited to others. The legislature, therefore, have deemed it proper to provide that the bodies may control their location and regulate their management, leaving it to each municipality to adopt the means.

Then, does the power to regulate the management include the power to prescribe their duties, and require them to obtain a license to pursue their business on the prescribed terms? We are clearly of opinion that the power to require a license is one of the means of regulating the exercise or pursuit of this business. There are, no doubt, a great variety of other means that might be adopted to accomplish the purpose, but these municipalities are not restricted as to the means they shall employ to regulate the business. In the various illustrations of the meaning of the word "regulate," we find, among others: "To direct; to rule; to govern; to conduct." As the language is used in reference to the power of a city or village government, we must suppose it was intended to mean that such bodies might rule or govern this character of business.

In the case of *The Town of Mt. Carmel v. Wabash County*, 50 Ill. 69, it was held that the general grant of power to an incorporated town to tax, restrain and suppress tippling houses, embraced the power to license the sale of liquor. The word "restrain" is not more comprehensive than "regulate." The former term is usually employed to signify to hold back, to curb, to hold in, to check, to prevent, to hinder, and to that extent it may mean to govern. But the power to regulate is surely as comprehensive as to restrain, and would seem to embrace the power to employ more and different means. It no doubt embraces the power to restrain by the

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same methods of restraint, and if a license may be required as a means of restraint, we have no hesitation in saying that it may be as a means of regulation. We are, therefore, clearly of opinion that the power is conferred to require the license in this case, under the 81st clause of the 62d section of the general law.

It is urged that these establishments may be regulated effectually without requiring them to procure a license. This is no doubt true, but conceding it, it does not follow that such a license may not be required as one of the unrestricted means cities and villages are empowered to employ for the purpose. Had those other means been enumerated in the charter, then, it may be, there would be force in the argument. But these bodies are empowered to use all legal, reasonable and proper means to regulate this business, and we have seen that to require them to procure a license and to submit to the ordinance regulating them, is one of the means sanctioned by the act.

In the cases of *The People v. Thurber*, 13 Ill., 554, and *City of East St. Louis v. Wehrung*, 46 id. 392, it was held that the fee required to be paid a city for granting a license to sell liquor, or to act as an agent of a foreign insurance company, is not a tax in the constitutional sense of that term, and is not governed by the requirements of the organic law in levying and collecting ordinary taxes. Hence no question of that character can arise in this case.

But it is urged, that the establishment of appellant is within the corporate limits of Lake and it has a license from that municipality to pursue its business, and the city of Chicago is therefore powerless to assume control over the business of appellant or the establishment in which it is done. There can be no doubt that the general assembly may, for police purposes, prescribe the limits of municipal bodies. It may enlarge or contract them at pleasure, and may define the limits within which their general powers may be exercised and extend or limit the boundaries in which special powers may be performed. Under the general law the limits prescribed by special charters of cities and villages are recognized as still existing, and within which they may exercise their general powers; but in addition thereto, this act has, for specified purposes, enlarged those boundaries one mile in every direction from the city or village limits proper, and the legislature has the power to increase those limits, even though they may lap over territory in the limits of other municipalities. As to the possession of this power

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there is no question, otherwise, it would not have legislative powers essential to government, nor is there any restriction on the power. Having the power, did they exercise it by this enactment? We can see many weighty reasons for exercising it. The town of Lake, under its charter, is, in its limits, co-extensive with the congressional township. It is vested, by its charter, with powers usually confined to cities and villages. But did the general assembly intend that so extensive a municipality territorially, and not populated as a city, might, on its border adjoining the city of Chicago, license establishments not at all inconvenient or injurious to its less dense population, but intolerable nuisances to the dense population of the city? Did they intend that the city should be annoyed and injured in health and comfort by the exercise of the power of a corporation with a comparatively sparse population, and to submit to have imposed on them such nuisances as the town of Lake might impose by licensing them? We cannot suppose the general assembly so disregardful of the health and comfort of such great numbers of people, but on the contrary, we must suppose it was intended that the people of Chicago, and other cities under like circumstances, should have the means of protecting themselves against such intolerable wrongs as might thus be inflicted upon them. We must conclude that the general assembly, rather than subject our large cities to such hazards from smaller municipalities in their immediate vicinity, would have repealed the charters of the latter, or at least have curtailed their power.

Whilst it is extremely difficult, in large and crowded cities, with their various commercial, manufacturing and other pursuits clashing each with the other, to so adjust the laws as to alike protect every right and interest, all must, to some extent, have his rights restricted for the benefit of all its people. What in an open or thinly settled country would be innoxious as a business, would in the heart of a city be a terrible nuisance, producing death, destroying property, and highly injurious to health and destructive to comfort. Persons, then, desiring to engage in particular avocations in or near to cities, must submit to have their pursuits limited and controlled, at least so far as the preservation of health, and to a reasonable extent the comfort, of the people may require, nor can the inhabitants of a city expect to be free from the tainted atmosphere produced by a thousand causes that do not exist in the country or in places less densely peopled.

Fitzgerald v. Staples.

Whilst trade, manufactures and commerce have large claims on the law for protection, theirs are not the only, nor are they the highest claims. The lives, the health and comfort of the people are the highest, and demand the first and greatest protection. Yet, in a great city like Chicago, which may, no doubt justly, claim to be the greatest cattle and hog market and the greatest meat-packing mart in the world, the people cannot expect to breathe the air as pure and invigorating as in the open country; but they do have the right to be protected against all kinds of business that endanger life and health, and from intolerable nuisances that destroy their comfort. To accomplish this purpose, the power was conferred upon cities and villages to regulate these establishments for the distance of one mile beyond their corporate limits, even if that should lap over and embrace a portion of territory included in the boundaries of another municipality. Each, to that extent, has the right to protect its inhabitants, and such establishments, located in such territory, are subject to the police power of both corporate bodies. This is within the letter, and we have no doubt, the spirit of the law. Nor does the fact that appellant is liable to pay a fee to each municipality for the privilege of pursuing a vocation the general assembly regards of such a character as to require regulation and control militate against the grant or exercise of the power.

The finding of the court below was required by the admitted facts of the case, and the judgment is affirmed.

Judgment affirmed.

FITZGERALD V. STAPLES.

(88 Ill. 234.)

Bond — when void for want of condition.

A bond recited a contract between the principal obligor and the obligee, and then without any condition, concluded, "then this obligation shall be void," etc. *Held*, to create no liability on the part of the obligors.

ACTION of debt. The opinion states the facts. The defendant had judgment below.

Fitzgerald v. Staples.

Robinson, Knapp & Shutt, for appellant.

John M. & John Mayo Palmer, for appellees.

CRAIG, J. This was an action of debt, brought by James M. Fitzgerald, against appellees, upon a bond, which was as follows :

“ *Know all men by these presents*, That we, Harry A. Staples, as principal, and Frank W. Tracy and George A. Sanders, as securities, of the city of Springfield, and State of Illinois, are held and firmly bound unto James M. Fitzgerald, of Springfield, Ill., in the sum of \$2,000, for the payment of which we hereby bind ourselves.

“The condition of this obligation is such, that whereas the above named Henry A. Staples has made, signed, executed and delivered a certain contract with the above-named James M. Fitzgerald, to receive from said Fitzgerald certain teas and coffees, sell and deliver same, pay over to said Fitzgerald all moneys received for said sales, less the amount of profits accruing to said Staples, each month, and make full and complete settlement each thirty days, then this obligation shall be void ; otherwise to be and remain in full force and virtue.

Sealed with our seals, and dated this 9th day of May, 1874.

HARRY A. STAPLES,	[L. S.]
FRANK W. TRACY,	[L. S.]
GEORGE A. SANDERS.	[L. S.]”

A contract, in writing, was made between Fitzgerald and Staples, bearing the same date of the bond, which provided the former should deliver to the latter, at his store, in Springfield, such quantities of good, merchantable teas and coffees as Staples might, from time to time, require, which were to be paid for by him. To secure the faithful performance of the contract, this clause was inserted: “He (Staples) further agrees to execute and deliver a bond of indemnity in the sum of \$2,000, with approved security.”

It appears, from the evidence on the trial, that goods to the amount of \$1,937.97 had been furnished, upon which Staples had paid only \$681.75, leaving a balance due of \$1,256.22. There is no dispute in regard to the fact that Staples is indebted to Fitzgerald for goods furnished under the contract, to the amount shown by the evidence ; but the question here presented is, whether an action can be maintained on the bond sued upon, against the sureties

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thereon. As has been suggested, the bond must receive a reasonable interpretation ; but in order to arrive at the intention of the parties at the time the bond was executed, we must resort to the language used by them in the obligation which they executed. A court of law has no right to presume contracting parties intended to insert in a written contract a provision other or different from that which the plain language used would indicate, and then give a construction to the contract which would be legitimate if the contract contained the supposed omitted provision. Such a practice would, in effect, be making contracts for parties, which courts are powerless to do. As we said in *Crabtree v. Hagenbaugh*, 25 Ill. 233, this, like all other agreements, must receive a reasonable interpretation, according to the intention of the parties at the time of executing it, if that intention can be ascertained from the language they have employed for that purpose.

Did the obligors in the bond incur any liability, by a fair or reasonable interpretation of the language used in the condition of the bond ? A bare inspection of the instrument gives a negative answer to the inquiry. The condition of the bond contains a bare recital that a certain contract had been made between Staples and the plaintiff, by which certain things were to be done by the contracting parties, and concludes by saying, "then this obligation shall be void; otherwise to remain in full force." It needs no argument to show that the parties who executed the bond incurred no liability by executing the instrument. Had the condition in the bond, after reciting the making of a contract between Staples and plaintiff, contained a clause, which is usually inserted, something like the following : Now, if the said Staples shall well and truly keep and perform the agreement aforesaid, then the obligation to be void, the liability of the parties would have been fixed, but the very language which seems necessary to render appellees liable seems to have been entirely omitted. The omission may have occurred by accident or mistake, but that in no manner affects the question here. The bond, as drafted and executed, imposed no liability upon those who executed it, and the court could not hold the obligors liable, unless some new provision was injected into the instrument, which the court had no power to do.

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

Gauch v. St. Louis M. L. Ins. Co.

GAUCH V. ST. LOUIS M. L. INS. CO.

(88 Ill. 251.)

Contract — construction — "legal heirs" — widow.

A widow is not a "legal heir" of her husband, within the meaning of a life insurance policy payable to the "legal heirs" of the insured husband, although by the statute the widow has a certain interest in the intestate husband's personalty.*

BILL of interpleader. The opinion states the facts.

W. C. Kneffner, and James M. Dill, for appellant.

J. B. Hay, for appellee.

SCHOLFIELD, C. J. Christian Gauch obtained a policy of insurance on his life, from the St. Louis Mutual Life Insurance Company, of 5,000, for the benefit of and payable to "his legal heirs or assigns." By his last will and testament, among other bequests, Gauch bequeathed this policy to his children. He died, leaving surviving him a widow and eight children. His widow renounced, in conformity with the provisions of the statute, the benefit of the bequests and devises made her by the will, and elected to take, in lieu thereof, her dower and legal share in the estate. Two-thirds of the amount due upon the policy were paid to the children of Gauch. The remaining third is claimed both by the widow and the children; and the insurance company filed its bill of interpleader to determine the rights of the respective claimants, and ascertain to whom this balance should be paid.

The court below decreed that the children were entitled to the entire amount called for by the policy, and consequently, that the unpaid balance due on the policy should be paid to them; and from that decree this appeal is prosecuted by the widow.

Assuming, as is tacitly conceded by counsel for appellee, that the bequest of the policy, by the last will and testament of Gauch, did not operate as a valid assignment to the children, the question is

* Widow not "next of kin:" *Keteltas v. Keteltas* (72 N. Y. 312); 33 Am. Rep. 111

be determined is, does the term "legal heirs," as used in the policy, include the widow?

Appellant's counsel refer to *Rawson et al. v. Rawson et al.*, 52 Ill. 62, and *Richards v. Miller*, 62 id. 417, as sustaining the affirmative of the question.

In those cases, the deceased left no child or children nor descendants of child or children surviving; and hence the widow in the first case, and the husband in the last case, occupied the relation to the deceased which entitled them to one-half of the real estate, and the whole of the personal estate, upon renouncing the benefits of the bequests and devises of the respective wills. In those cases, the husband and wife, respectively, were held to be heirs at law, under the existing facts. Had there been a child or children or descendants of a child or children surviving, however, it is evident it could not have been held they were heirs at law, on the grounds stated in the opinions, for, in that contingency, the child or children, or descendants of child or children, would have been entitled to the property, subject to the claim of dower in the real estate, and the claim for one-third of the personal property of the surviving husband or wife.

In certain contingencies, brothers, sisters, parents, and even kindred in the remotest degree, are heirs at law; but it would be absurd in the extreme to suppose that an individual having children, who should devise and bequeath his property to his "legal heirs," intended all his kindred should take. The legal presumption, in such case, would clearly be, that he intended those to whom the law would give his property—real and personal—he dying intestate; and hence it is the actual capacity of inheritance, at the time of the death of the owner of the property, and not the fact that a particular person might have inherited from him under a state of facts which did not exist, that determines who is heir.

It is plain the widow here did not take as did the parties in *Rawson et al. v. Rawson et al.*, and *Richards v. Miller*, *supra*, because Gauch left children surviving him, and she cannot, therefore, be declared "legal heir" upon the grounds upon which the wife in the one case and the husband in the other were there so declared.

But reliance is placed by counsel for appellant on this language, found in the Revised Statutes of 1874, in the fourth clause of section 1 of chapter 39, entitled "Descent:" "When there is a widow or a surviving husband, and also a child or children, or descendants

of such child or children of the intestate, the widow or surviving husband shall receive, as his or her absolute personal estate, one-third of all the personal estate of the intestate." So far as this affects the widow, it is not of recent enactment. The only new feature in it is that recognizing the same right of the husband in respect to the wife's estate that the wife has in respect to that of the husband; and this was, obviously, to harmonize with the statute abolishing tenancy by the curtesy and giving the husband dower in the lands of the deceased wife, the same as the wife has in the lands of the deceased husband. See R. S. 1874, ch. 41, title, Dower, § 1. The provision was first enacted in section 6 of "An act to amend an act concerning wills," approved February 11, 1847. (Laws of 1847, p. 168.)

The section then read thus: "The word 'dower,' as used in the 46th section of the 109th chapter of the Rev. Stat., entitled 'Wills,' shall be construed to include a saving to the widows of persons dying intestate, of one-third of the personal estate forever, after the payment of debts."

Section 46 of the Revised Statutes of 1845, which was thus amended, declares how estates of intestates shall descend. R. S. 1845, p. 545.

In *Rawson et al. v. Rawson et al.*, *supra*, it was argued that this amendment repealed so much of the section amended as gave to the widow of an intestate who left no child or children or descendants of child or children surviving, one-half of the real and the whole of the personal estate, but this court said: "It is very apparent, we think, that this act is treating of a widow entitled to dower, not as an heir under the 46th section, under which the claim in question is presented. The only subject before the legislature when this amendatory act was passed was the rights of the widow as such. It was not designed to abridge her rights as an heir under the statute of descents, but to enlarge her dower rights." If that was the object and effect of that enactment, then it can hardly be seriously claimed that the revision of 1874 has changed it.

That it was intended to be used in the same sense in the revision of 1874 is, we think, further obvious from the 10th section of chapter 41 of that revision, entitled "Dower," which provides: "Any devise of land or any estate therein, or any other provision made by the will of a deceased husband or wife for a surviving wife or husband, shall, unless otherwise expressed in the will, bar the

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dower of such survivor in the lands of the deceased, unless such survivor shall elect to and does renounce the benefit of such devise or other provision, in which case he or she shall be entitled to dower in the lands and to one-third of the personal estate after the payment of debts."

Now, this very clearly has no reference whatever to the rights of the husband and wife as *heir* to each other, but solely to their rights as *widow* or *surviving husband*. And this is placed beyond cavil by the twelfth section of the same act, which exclusively relates to cases where, under the statute, the one inherits from the other, and a will has been made.

The word "heir" has a technical signification, and we must presume that in the policy the term "legal heirs" was used in its strict and primary sense, there being nothing in the context to show that it was used in any other sense. It was said in *Richards v. Miller, supra*, "the word heir, when uncontrolled by the context, designates the person appointed by law to succeed to the real estate in question in case of intestacy;" referring to 2 Jarman Wills, 1, Jacobs says, "heir is he who succeeds, by descent, to lands, tenements and hereditaments, being an estate of inheritance." We know of no respectable authority, and venture there is none, holding that one entitled to dower or an interest in the nature of dower, or any allowance of personal property only, because of the survivorship of the husband or wife, is held to be included within the legal definition of "heir." Nor is the distinction between the word "widow" and the word "heir" less marked in common parlance. No one having children, speaks of his wife, in contemplation of her survivorship, as his "heir;" but it is believed it is universal that she is referred to as "widow," and the children as "heirs."

There is, therefore, no reason, in our opinion, for holding that when Gauch had the words "legal heirs" inserted as the beneficiaries of the policy, he intended his wife.

Parol testimony was admitted on the hearing tending to show that Gauch intended his children by the word "heirs." The court below did not, nor do we, take this evidence into consideration, in arriving at the construction to be placed upon the language of the policy, and it is, therefore, unimportant whether its admission was proper or not.

The decree below is affirmed.

Decree affirmed.

CUMMINS V. CRAWFORD.

(88 ILL. 312.)

Trespass for personal injury—threats as a justification — evidence of character.

The defendant, armed and sitting in the road, saw the plaintiff coming toward him with a gun on his shoulder, and thereupon concealed himself and shot the plaintiff, although the latter made no hostile demonstrations, and the defendant could easily have got away. The defendant knew that the plaintiff twenty days before had threatened to take his life, but there had been no attempt to carry out such threats. *Held* (1) that the threats did not justify the defendant's action; (2) that evidence of the violent and dangerous character of the plaintiff, and of the peaceable character of the defendant, was incompetent.

TRESPASS for shooting the plaintiff. The opinion states the facts. The plaintiff had judgment below.

J. H. Halley, and H. B. Decius, for appellant.

E. Callahan and J. W. Wilkins, for appellee.

SCOTT, J. On the 27th day of November, 1875, plaintiff, while passing along the highway, was shot by defendant, inflicting severe wounds, and this action was brought to recover damages for the injuries sustained. The facts are so fully proven they admit of no controversy. Defendant's own statement may be received as presenting substantially the facts as they occurred. In the morning of the day on which the shooting took place, defendant, who was sheriff of his county, was preparing to go out to serve papers, and while waiting for his buggy he sat down at the corner of the fence, probably the ends of some of the rails extending out past him, at a point two or three panels east of the lane coming from the south that intersects the road running east and west. He had not been sitting there long when his brother told him plaintiff was coming. Hastily putting away his papers he had been examining, he told his brother to go away, as he did not wish him mixed up in the affair. Plaintiff was then some considerable distance away, walking on the highway in the direction of defendant, carrying his gun on his shoulder with his arm over the breech and his hand thrust into his bosom. As plaintiff approached, defendant took a rest on

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the corner of the fence for his gun, and when he was near enough, defendant, taking deliberate aim, shot him. Defendant says plaintiff still appeared to be advancing toward him when he fired the other barrel of his gun at him. The gun used by defendant had a double barrel; one was loaded with powder and leaden ball, and the other with powder and small "turkey shot" or "small buck shot." The one first discharged was the rifle ball, which took effect in plaintiff's left breast, passing through a part of the lungs and coming out near the shoulder blade, and the shot from the other barrel took effect in his leg.

It is not probable plaintiff either saw defendant or was aware of his presence in that immediate vicinity until he was shot. In giving an account of the affair at the office of the justice of the peace, soon after it happened, defendant says he did not think plaintiff saw him until after he fired the second shot. Apparently defendant was under no mental excitement whatever, but coolly and deliberately planned to take the life of plaintiff. According to his own statement he was not nervous, and his own account, as given on the witness stand, expressive of his intention, is: "I intended to kill; that was my purpose when I shot." Other testimony is to the effect he expressed regret that he had not killed plaintiff, and that he was "afraid he would have to do it over."

The only defense insisted upon is, that plaintiff had, at an election held some twenty days before, and perhaps on some other occasions about that time, threatened to take the life of defendant, and the reason assigned was, that defendant had accused plaintiff of being guilty of a petty larceny. In giving his testimony, defendant was permitted to state that such threats had been communicated to him previous to the shooting; that he believed plaintiff would carry his threats into execution; that he believed, if they should meet, one or the other would be killed, and that he shot him to save his own life. Other witnesses testified that defendant made the same statements in the history he gave of the transaction at the office of the justice of the peace, and even stated some of the threats he understood plaintiff had made against his life.

There is no pretense plaintiff had made any effort to carry such threats into execution, either at the time of shooting or at any other time. There is no evidence that the defendant expected plaintiff at that place on that morning, nor that he took his position with a view to wait for him; but it is proven that after he saw him com-

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ing, he did lie in wait for him, and from the place where he was concealed from the view of plaintiff, shot him, when plaintiff was not aware of his presence in the vicinity. After defendant saw plaintiff coming on the highway, there was plenty of time for him to have walked away, had he chosen to do so, and thus avoided any difficulty. His brother, at his request, did go away. Nor had defendant any well founded reason to apprehend danger. He was well armed, and had plaintiff put forth any efforts to put into execution threats which defendant understood he had made against his life, or made any demonstrations of violence that would have excited in the mind of a reasonable person apprehensions of serious danger, defendant could have defended himself. Instead of waiting to see whether plaintiff had any hostile intention toward him, or whether he was in the slightest danger of being attacked, he shot him, without even apprising him of his presence. The act was without a shadow of justification in the law.

But defendant offered to prove, on the trial, by a number of witnesses that they had heard plaintiff make threats against the life of defendant, some twenty days before the shooting. That evidence was excluded, and the decision of the court rejecting it is assigned for error. The evidence was not offered as a matter of defense, but in mitigation of punitive or exemplary damages; but our opinion is, it was not competent for any purpose. There is no principle with which we are familiar on which such evidence is admissible. Unless the threats which it is proposed to prove are so recent as to become a part of the transaction being investigated, such testimony is not admissible, under any known rule of evidence, for any purpose. So this court has declared, in *Sorgenfrei v. Schroeder*, 75 Ill. 397. Although threats may have been made against the life of another, such party may not assail or take the life of the person making such threats, where he has done no act indicating a purpose to carry such threats into execution, or where there are no circumstances that would induce the belief in the mind of a reasonable person there was imminent danger he would do so. The annunciation of a principle that would justify a person to lie in wait to take the life of another, because at some previous time he may have made threats of bodily harm to him, would be fraught with dangerous consequences to society. It would license crime but little less in turpitude than assassination. Before a party may attack or inflict bodily harm upon a person who has made threats

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against him, however well grounded his apprehension may be, there must be some overt act from which an intention may be reasonably inferred to carry into effect his threats of personal violence, and that the danger is imminent. Illustrative of this view of the law are the following cases: *Lander v. State*, 12 Tex. 462; *Evans v. State*, 44 Miss. 762.

These salutary principles have been applied, in all their strictness, in civil actions for the recovery of damages in cases of assault and battery. The rule deducible from the cases on this subject is, that such testimony as that offered, and rejected by the court, in this case, is not admissible, even in mitigation of damages, in that class of actions.

In *Lee v. Woolsey*, 19 Johns. 318; 10 Am. Dec. 230, the chief justice, in delivering the opinion of the court said — and there is great force in his remarks: “It appears to me neither to comport with sound policy nor law to allow an inquiry into antecedent facts, in such cases as this, unless they are fairly to be considered as a part of one and the same transaction. A contrary course would encourage breaches of the peace, personal rencounters and every species of brutal force, and would tend to uncivilize the community.” The same general doctrine was declared by this court in *Sorgenfrei v. Schroeder*, *supra*, and in cases in other courts. *Avery v. Ray*, 1 Mass. 11; *Ireland v. Elliott*, 5 Iowa, 478; *Willis v. Forrest*, 2 Duer, 310.

There can be no pretense that defendant was in any immediate danger of his life or of any bodily harm at the hands of plaintiff, when he attempted, as he admits, to take his life by a well-aimed shot. There was nothing to excite apprehension, even, in the mind of any reasonable person. Plaintiff had done no overt act that indicated any intention to attack defendant; and had he done so, defendant was fully armed and prepared to defend himself. Simply because he had heard plaintiff had made threats against his life, defendant planned to take the life of plaintiff, and, from his secret place, undertook to carry out his terrible purpose. This the law will not tolerate.

Had defendant entertained fears of bodily harm at the hands of plaintiff, it was his privilege, under our laws, to have him placed under bonds to keep the peace. That would have induced investigation, which would have developed whether there was really any danger to be apprehended, or whether the threats defendant had

 Scott v. Kirkendall.

heard, if made at all by plaintiff, were any thing more than mere bravado. The law will not, and ought not, for the peace of society, to sanction lying in wait to punish another summarily who such party may suspect, or even believe, may have meditated doing him a personal injury, however well founded his belief may be.

The evidence offered as to the character of plaintiff and defendant was properly rejected. We do not understand the characters of the parties, whether men of violence or law-abiding citizens, were involved. No matter if plaintiff was a bad man, that did not afford defendant any pretext for seeking to take his life, and the injuries plaintiff may have suffered are in no manner mitigated by the fact defendant may have been previously a law-abiding citizen. As a general rule, the character of plaintiff, in such cases, is not the subject of inquiry. Particular acts, where they constitute a part of or explain the transaction, may sometimes be proven in mitigation of damages.

[Omitting minor points.]

The judgment will be affirmed.

Judgment affirmed.

SCOTT V. KIRKENDALL.

(88 Ill. 465.)

Deed — covenant of warranty — what constitutes eviction.

The mere existence of a paramount hostile title does not constitute a breach of the covenant of warranty.*

ACTION of covenant. The opinion states the facts. The defendant had judgment below.

Stevenson & Ewing, for appellant.

Hughes & McCart, for appellees.

SHELDON, J. On the 19th day of May, 1871, appellees, by deed containing the ordinary covenant of general warranty and the other usual covenants, conveyed to William K. Dewey the south half of

* Compare *Green v. Irving* (54 Miss. 450), 28 Am. Rep. 300.

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a section of land in Greenwood county, Kansas. Dewey afterward conveyed the land to Dunlap and Robinson, as trustees, etc., who afterward, in pursuance of a decree of court, conveyed the same to Edward Scott, the appellant, as their successor in trust. Scott brought this action of covenant against the appellees, upon the covenant of warranty in their deed to Dewey, alleging a breach thereof. Upon a trial by the court, without a jury, the issue was found in favor of the defendants, and a judgment rendered accordingly, from which the plaintiff appealed.

The facts, as presented by the evidence, are, that, at the time of the execution of the deed by the appellees, they had no title to the land, but the paramount title to one quarter section of the land was still in the United States, and to the other quarter in one Holman, by virtue of a patent from the United States, issued on the 15th day of August, 1871. The land was vacant and unoccupied. Neither appellant, appellees, Holman nor Dewey have ever had actual possession of any of the land. These are all the material facts bearing upon the point of a breach of the covenant of warranty.

The only question presented by the record which we need to consider is, whether there can be a recovery in an action of covenant for breach of the covenant of warranty, in a case where the land concerned is and ever has been vacant and unoccupied, without showing more than an outstanding paramount title. The great current of authority is in favor of the negative of the proposition.

It is common doctrine, and well established generally, that the mere existence of a paramount legal title which has never been asserted, cannot amount to a breach of this covenant. The covenantee, or his assignee, must be disturbed in the possession, actual or constructive—he must be evicted, or there be something equivalent thereto; and in the action the plaintiff must allege and prove an ouster or eviction by a paramount title. It is not necessary, however, that he should be evicted by legal process; it is enough that he has yielded the possession to the rightful owner, or the premises being vacant, that the rightful owner has taken possession. 3 Washb. Real Prop. 406; Sedgw. on Dam. (6th ed.) 158 marg.; *Greenvault v. Davis*, 4 Hill, 643; *St. John v. Palmer*, 5 id. 599; *Day v. Chism*, 10 Wheat. 449; *Marston v. Hobbs*, 2 Mass. 433; *Sprague v. Baker*, 17 id. 586; *Jenkins v. Hopkins*, 8 Pick. 346; *Moore v. Vail*, 17 Ill. 185; *Matteson v. Vaughn*, decided by the

Supreme Court of Michigan at its January term, 1878 ; and see note to *Foots v. Burnet*, 10 Ohio, 319, for a collection of cases as to what amounts to eviction. This covenant of warranty is regarded as, in effect, a covenant for quiet enjoyment, and can only be broken by something equivalent to an eviction or disturbance of possession of the grantee. 3 Washb. Real Prop. 398. What will be held as equivalent to eviction, authorities may differ concerning, but there is a general concurrence that something more than the mere existence of a paramount title is necessary to constitute a breach of the covenant of warranty.

The cases cited by appellant's counsel from our own reports of *Beebe v. Swartwout*, 3 Gilm. 162 ; *Moore v. Vail*, 17 Ill. 185 ; *Claycomb v. Munger*, 51 id. 373, and *Wead v. Larkin*, 54 id. 489 ; s. c., 5 Am. Rep. 149, as being supposed to sanction the doctrine that the action may be maintained upon the mere existence of a superior title in another, we regard as falling short of so doing. The last case has no particular application. *Beebe v. Swartwout* and *Claycomb v. Munger* affirm nothing more than that the covenantee may peaceably and voluntarily yield to the paramount title, not deciding that he may do so when the adverse title has not been hostilely asserted. In *Claycomb v. Munger*, a mortgage existing upon land at the time of the execution of a deed with warranty was subsequently foreclosed, and a deed executed to the purchaser under the foreclosure sale, and acknowledging that the covenant of warranty is broken only upon an eviction, or by something equivalent thereto, it was held that the grantee in the warranty deed might voluntarily yield to the superior title under the foreclosure sale, and purchase it for his own protection, and thereupon maintain suit upon his covenant of warranty. The decision was based upon the authority of *Moore v. Vail*, *supra*, among others. *Moore v. Vail* touches the precise question here involved, and is in direct opposition to the theory upon which this suit is sought to be maintained. It was an action upon a covenant of warranty. The court there, after laying it down that where the premises were in the actual possession of another, who held them under a paramount title, the covenant of warranty was broken, as also that if the covenantee be in the actual possession of the estate, he has the right to yield that possession to one who claims it under a paramount title, say : " This, however, is not to be understood as holding that the mere existence of a paramount title constitutes a breach of the covenant, or

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that it will authorize the covenantee to refuse to take possession when it is quietly tendered to him, or when he can do so peaceably, and then claim that by reason of such paramount title and his want of possession, the covenant is broken; nor will it justify him in abandoning the possession, without demand or claim by the one holding the real title. His possession, under the title acquired with the covenant, is not disturbed by the mere existence of that title; and he has no right to assume that it ever will be, until he actually feels its pressure upon him." And again: "Until that time (the taking possession by the owner of the paramount title), he might peaceably have entered upon and enjoyed the premises, without resistance or molestation, which was all his grantors covenanted he should do. They did not guarantee to him a perfect title, but the possession and enjoyment of the premises." We do not see but what this fully decides the present case against the appellant. It holds that the mere existence of a paramount title does not constitute a breach of the covenant. That is all there is here. There has been no assertion of the adverse title. The land has always been vacant. Appellant could at any time have taken peaceable possession of it. He has in no way been prevented or hindered from the enjoyment of the possession by any one having a better right. It was but the possession and enjoyment of the premises which was assured to him, and there has been no disturbance or interference in that respect. True, there is a superior title in another, but appellant has never felt "its pressure upon him."

To sustain the present action would be to confound all distinction between the covenant of warranty and that of seizin, or of right to convey. They are not equivalent covenants. An action will lie upon the latter, though there be no disturbance of possession. A defect of title will suffice. Not so with the covenant of warranty, or for quiet enjoyment, as has always been held by the prevailing authority. See, too, Rawle on Cov. for Title, 235, 271.

We regard the judgment as right and it is affirmed.

Judgment affirmed.

GRIDLEY V. CITY OF BLOOMINGTON.

(88 Ill. 534.)

Municipal corporation — ordinance to compel removal of snow by citizens.

A municipal ordinance requiring occupants and owners of premises to remove snow from the adjacent sidewalks is invalid.

ACTION for a penalty, under a municipal ordinance. The opinion sufficiently states the facts. The plaintiff had judgment below.

E. M. Prince, and Karr & Karr, for appellant.

SCOTT, J. The ordinance under which defendant was prosecuted imposes a fine upon any one who shall permit snow to remain on the sidewalk abutting premises occupied or owned by him, longer than a period of six hours after it ceases to fall, or if the cessation is in the night time, then longer than six hours after sunrise on the next morning. The validity of that ordinance is the only question made on the argument. It was admitted the lot occupied by defendant was one of an addition to Bloomington that was laid out in 1836, and hence it follows, under the decision of this court, the fee of the street in front of the premises was either in the original proprietor or in the corporation. *Indianapolis, Bloomington and Western R. R. Co. v. Hartley*, 67 Ill. 439; s. c., 16 Am. Rep. 624; *Gebhardt v. Reeves*, 75 Ill. 301.

The public had an easement over the street in front of the lot occupied and owned by defendant, and it makes no difference, so far as this decision is concerned, whether the fee of the street passed by the plat and dedication to the corporation, or whether it remained in the original proprietor. It is plain defendant has no other interest in the street in front of his property than any other citizen of the municipality. The same is true of the sidewalk. It is a part of the street set apart for the exclusive use of persons travelling on foot, and is as much under the control of the municipal government as the street itself. The owner of the adjacent lot is under no more obligation to keep the sidewalk free from obstructions than he is the street in front of his premises. He may not

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himself obstruct either so as to impede travel on foot or in carriages. It will be conceded the citizen is not bound to keep the street in front of his premises free from snow or any thing else that might impede travel; then, upon what principle can he be fined for not removing snow or other obstruction from the sidewalk in which he has no interest other than what he has in common with all other persons resident in the city? It is certainly not upon the principle under which assessments are made against the owner for building sidewalks in front of his property. The cases are not analogous. Such assessments are maintained on the ground the sidewalk enhances the value of the property, and to the extent of the special benefits conferred they are held to be valid.

It would be absurd to suppose that assessments for benefits for local improvements could be enforced by fines or penalties, as in the ordinance under which the defendant was fined. Nor do we think this ordinance can be upheld as an exercise of the police power inherent in all municipal governments. It was expressly decided by this court, in *City of Ottawa v. Spencer*, 40 Ill. 211, that local improvements of either sidewalks or streets cannot be compelled, under the general police power. The legislature must afford the necessary power for constructing all needful improvements, subject to constitutional limitations; and when one mode of making such improvements is sanctioned by the constitution, no other can be adopted.

Keeping streets and sidewalks in repair, and free from obstructions that impede travel or render it dangerous, is referable to the same power as for constructing new improvements. The sidewalk, as was declared in the case cited, is as much a public highway, free to the use of all, as the street itself, and upon principle, it follows, the citizen cannot be laid under obligations, under our laws, to keep it free from obstructions in front of his property at his own expense, any more than the street itself, either by the exercise of the police power or by fines and penalties imposed by ordinance, or by direct legislative action.

Our conclusion is, the ordinance in question is invalid, and the judgment must be reversed and the cause remanded.

Judgment reversed.

CASES
IN THE
SUPREME COURT COMMISSION
OF
OHIO.

HARE V. GIBSON.

(22 Ohio St. 32.)

Marriage — wife's necessities pending action for divorce — alimony.

Where a wife is living separate and apart from her husband, and in a suit against him for divorce and alimony, has obtained a decree fixing the amount of alimony to be paid by the husband for her sustenance during the pendency of her petition, and the husband is not in default in respect to the payment of the alimony so allotted, he is not liable for necessities subsequently furnished at her request during the pendency of her petition.

Persons dealing with the wife, under these circumstances, do so at their own peril, and are chargeable with knowledge of the allotment and payment of the alimony.*

The adequacy of the alimony decree in such case cannot be collaterally drawn in question, especially by a stranger to the suit.

ACTION on account. The opinion states the facts. The judgment of the trial court was for defendant, but was reversed by the District Court.

D. D. Hare, for plaintiff in error.

SCOTT, J. Defendant in error brought his action, to recover of the plaintiffs in error the amount of an account for medical serv-

*See *Olson v. Heritage* (45 Ind. 73), 15 Am. Rep. 253.

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ices and care bestowed by him as a physician in attendance upon the wife of their intestate. The action was brought originally before a justice of the peace of Wyandot county, and came into the Court of Common Pleas by appeal. A copy of his account was attached to his petition, and the items were from July 18th till October 28, 1869, and amounted in the aggregate to \$48. The defendants below answered, admitting that the services stated in the petition were rendered for the wife of their intestate, but denying that such services were rendered at the instance of the deceased, Levi Hare. Further answering, they say "that at and during the time when the services mentioned in the petition are claimed to have been rendered, the said Rebecca Hare was living separate and apart from her husband, the said Levi Hare, against whom she was prosecuting, in the Court of Common Pleas of Seneca county, a suit for divorce and alimony, which suit was still pending and undetermined at the death of said decedent, December 11, 1869.

That on the 22d day of June, 1869, after said suit had been instituted, on motion of said Rebecca Hare, a decree for alimony pending said suit was made by said court and duly entered upon the journal thereof, granting to the said Rebecca Hare an allowance of one hundred and seventy-five dollars as such alimony.

Said alimony was by said decree made payable in installments, as follows, to wit: twenty-five dollars in ten days from the date of said decree; twenty-five dollars on the 21st day of August, 1869; twenty-five dollars on the 21st day of September, 1869; and one hundred dollars on the 21st day of October, 1869.

Every installment of said alimony was paid by the said Levi Hare on or before the day when the same became due, and all of said alimony had been fully paid before the 28th day of October, 1869."

To this answer the plaintiff below replied, alleging that he had no knowledge of the granting of said alimony or of its payment, and averring "that at the time of the allowance of said alimony, the said Rebecca A. Hare was in ordinary health; was able to and did perform her own work and labor, and such allowance was made to said Rebecca A. Hare for her maintenance, with the knowledge that said Rebecca Hare was then in such ordinary health, and so able to perform her work and labor.

"That in making said allowance, the costs, expenses, and attorney fees incident to the proper preparation of said cause of said.

Rebecca A. Hare v. Levi Hare, in said Seneca Common Pleas, for trial at the November term thereof, A. D. 1869, was not included and taken into the account.

“That said allowance so made, as aforesaid, was entirely insufficient to provide proper support and necessaries for said Rebecca A. Hare, at and during the time of the rendition of the services set forth in plaintiff’s petition, and said plaintiff’s account for such services.

“That said Rebecca A. Hare, during the time of the rendering of said services, was sick and unable to perform her own work and labor, and was subjected to great expense by reason of said sickness.”

To this reply, the defendants below demurred; their demurrer was sustained, and plaintiff below excepted.

The case was thereupon submitted to the court upon the pleadings on file in the case; and the court, being of opinion that the plaintiff was not entitled to recover, rendered judgment in favor of defendants below for their costs. Upon the petition in error of plaintiff below, this judgment was reversed by the District Court of Wyandot county, and the demurrer of defendants to the reply of the plaintiff below was overruled, and the case remanded to the Court of Common Pleas for further proceedings.

Plaintiffs in error here seek a reversal of this judgment of the District Court.

Two questions are raised upon the record. *First*. Do the facts stated in the answer of defendants below constitute a defense to the plaintiff’s action? We think they do. The facts stated in the answer are, that during the whole time that plaintiff was rendering the services in question, the wife of Hare was living separate and apart from her husband, and was prosecuting a suit against him for divorce and alimony, and that before the plaintiff began to render his services, she had obtained an order of the court, in which her petition for divorce was pending, awarding to her one hundred and seventy-five dollars as alimony *pendente lite*, to be paid by the husband in specified installments. That this order of the court was fully complied with, and the installments punctually paid by the husband at or before the times when they severally became due, and that such payments were fully completed before the close of plaintiff’s account.

The 9th section of the “act concerning divorce and alimony,” as amended in April, 1857, provides that the court while in session,

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or any judge thereof during vacation, upon sufficient notice to the opposite party, shall have power to grant alimony to the wife for her sustenance during the pendency of a petition for divorce or alimony. S. & C. 513.

Where, in the exercise of the power thus conferred, a court of competent jurisdiction has, by decree, fixed the amount of alimony to be paid to the wife for her sustenance *pendente lite*, so long as the husband is not in default in making payment according to the order of the court, and the wife continues to live separate and apart from him, the husband is not liable on her contracts. Speaking on this subject, Mr. Bishop, in his work on Marriage and Divorce, says: "The allotment of temporary alimony is really for the benefit as well of the husband as the wife, especially in those cases where he is the guilty party. For if no such allotment has been made, he is liable, at the common law, for necessities furnished her during the pendency of her suit for divorce, the same as though it was not pending. * * * But if he has regularly paid it, he is relieved from all further responsibility." 2 Bish. on Marr. and Div., § 401. In *Bennett v. O'Fallon*, 2 Mo. 69, it was held, that after a decree for alimony, the husband is not chargeable for debts contracted by the wife. And the court says: "The very object of the decree for alimony is to furnish the wife with necessities, and the court will take care that it be made effectual for that object, and suited to the condition of the parties. By the decree the husband is charged directly with the due maintenance of his wife; to make him responsible to persons with whom she might afterward deal, would be to charge him indirectly for the same object." See, also, *Willson v. Smyth*, 1 B. & Ad. 801, and *Brisco v. Brisco*, 2 Hag. Con. C. 199.

These authorities fully sustain us in holding that the answer of defendants below constitutes a good defense to the action.

The second question is: Are the facts stated in the reply of plaintiff below sufficient to avoid the defense made by the answer? The plaintiff says, first, that he had no knowledge of the allotment and payment of the alimony. The answer to this is, that he should have inquired. He was dealing with a married woman living separate from her husband, and the authorities are abundant that he could do so only at his own peril.

The presumption of law, in such case, is that the husband is not liable, and the circumstances fixing his liability must be shown by

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the party seeking to charge him. If he took the risk of doing so, without inquiry, he has only himself to blame. Tyler on Coverture, 355; *Cartwright v. Bate*, 1 Allen, 514; *Rea v. Durkee*, 25 Ill. 503; *Blowers v. Sturtevant*, 4 Den. 46; *Breinig v. Meitzler*, 23 Penn. St. 156; *Gill v. Read*, 5 R. I. 343; *Bennett v. O'Fallon*, *supra*.

The reply avers, secondly, that the alimony allotted to the wife proved to be inadequate, by reason of her subsequent ill health, which was not anticipated when the amount was fixed by the court.

This change in her circumstances would, no doubt, have justified her in applying to the court, or to a judge at chambers for an increase of the sum allowed. But, if she remained satisfied with the amount decreed, others have no right to complain.

The exercise of the judicial discretion which she had herself invoked cannot be collaterally impeached or drawn in question, especially by a stranger to the controversy. We are of opinion, therefore, that the Court of Common Pleas did not err in sustaining the demurrer to this reply, nor in entering judgment for defendants below, on the pleadings; and that the District Court should have affirmed instead of reversing said judgment.

Judgment accordingly.

BIRDSALL V. HEACOCK.

(23 Ohio St. 177.)

Guaranty — letter of credit.

A letter addressed to a lumber merchant in the following language: "Please send my son the lumber he asks for, and it will be all right," is a guaranty that the lumber sold and delivered to the son, at the time of its presentation, will be paid for. But such guaranty is not *continuing*, so as to make the guarantor liable for lumber subsequently purchased by the son from the same merchant. And payments afterward made by the principal, on account, will be applied in satisfaction of the first purchase, and consequent discharge of the guarantor's liability.*

ACTION on account against the defendant in error, as guarantor for T. C. Heacock, by virtue of the following instrument:

*See *Pollock v. Helm* (54 Miss. 1), 23 Am. Rep. 342, and note, 347; *Watts's Bank v. May* (73 N. Y. 335), 20 Am. Rep. 157.

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“ALLIANCE, *May* 11, 1868.

“E. H. POTTER — Please send my son the lumber he asks for and it will be all right. I had to get him to write this as I was kicked with a horse one week ago on the arm and cannot more than write my name if that. (Signed) “EDWIN HEACOCK.”

The complaint stated: “That said T. C. Heacock is the son of Edwin Heacock, and at the time of writing said guaranty and the commencement of dealing between said firm and him in said account, the said T. C. Heacock was about to engage in the business of building houses and keeping a lumber-yard for the sale of lumber of all kinds, in the village of Alliance, in said county of Stark, and had no capital or credit of his own. That he expected to carry on said business through several seasons, all of which was known to the said E. H. Potter and to said Edwin Heacock, and in order to give him, said T. C. Heacock, such credit from the said firm as he might desire in his said business, said Edwin Heacock executed said letter of guaranty and delivered it to his son, T. C. Heacock, who is the son mentioned therein, for the purpose of its being delivered to the firm of E. H. Potter, as a guaranty to them, and to procure credit for his son, and it was signed and executed by said Edwin Heacock, on or about May 11, 1868, and produced to said firm and delivered to it by said T. C. Heacock, when he first applied to them to buy lumber. And induced by said letter, and in faith of said promise and guaranty which was then delivered to said firm in the way of his business as such builder and keeper of a lumber-yard, and for reasonable prices, and on reasonable terms, agreed upon between said firm and said T. C. Heacock, said firm sold lumber to said T. C. Heacock, at different times, as shown in the foregoing account, for the purpose of enabling him to carry on his said business, in all amounting to the sum of \$2,962.51, up to September 15, 1871, on which the sum of \$2,522.78 has been paid, as aforesaid, and the credit and time of payment of the said lumber by said Heacock to said firm has long since expired, and yet said T. C. Heacock has not, nor has said Edwin Heacock, paid said sum yet due, nor any part thereof. And of all of said premises said Edwin Heacock had frequent notice, and yet he refuses to pay the said firm, and to this partner, as surviving partner thereof, the said sum so due, or any part thereof, although often requested so to do.” The defendant demurred, and had judgment.

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Joseph Parker, for plaintiff in error. The weight of recent decisions in England and in this country establishes the following rules for the construction of guaranties :

1. They are governed by the same rules of construction as other contracts.

2. They are most strongly construed against the guarantor, and there is a presumption in favor of validity.

3. The court must give effect to the intention of the parties.

4. To arrive at the intention of the parties the circumstances under which, and the purposes for which, the contract was made may be proved, and must be kept in view in its construction. *Crist v. Burlingame*, 62 Barb. 351; *De Colyar on Guaranties*, 2141; 2 Para. on Cont. 500; *Salmon Falls Co. v. Portsmouth Co.*, 46 N. H. 249.

5. The court must look at the surrounding circumstances in the construction of guaranties, and if the circumstances attending the giving of the instrument show that the actual intention of the guarantee was to ask, and the guarantor to give, a guaranty which should operate as a continuing assistance to the guarantee in a business, then, although the language in the writing is capable of a more restricted operation, the court will give effect to the proved intention, and construe the contract as continuing, if its terms will admit it. *Bainbridge v. Wade*, 1 Eng. Law and Eq. 236; *Haigh v. Brooks*, 10 Ad. & El. 309; *Rapelye v. Bailey*, 5 Conn. 149; *Gates v. McKee*, 3 Kern. 232; *Allan v. Kenning*, 23 Eng. C. L. 401; *Rogers v. Warner*, 8 Johns. 119; *Whitney v. Groot*, 24 Wend. 82; *Fellows v. Prentiss*, 3 Denio, 512; *Boehne v. Murphy*, 46 Mo. 57; 2 Am. Rep. 485; *Schlessinger v. Dickinson*, 5 Allen, 47.

Construing this writing in the light of the rules laid down Edwin Heacock meant to bind himself to pay any balance owing to the plaintiff by T. C. Heacock. *Sickle v. Marsh*, 44 How. 91; *De Colyar on Guaranties*, 240, 244, 245, 246, 247, 248; *Boehm v. Murphy*, 40 Mo. 57.

James Amerman, for defendant in error.

SCOTT, J. Counsel for defendant in error claims that the instrument of writing upon which the petition in this case bases the liability of their client is not a guaranty of any kind. The petition, however, avers that it was acted upon as a guaranty by the plaintiff's firm; and from its terms we think it was intended by the

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writer that it should be so understood and acted on. It is not a representation as to the solvency or pecuniary circumstances of the party about to ask credit from the plaintiff; but a request or direction that such credit should be given, and an unqualified assurance that the doing so would "be all right." The sale and delivery which it directs or requests could only be made "all right" to the plaintiff by punctual payment, according to the terms of the sale. And we think the writing imports a guaranty of such payment. It was an absolute assurance that the lumber which might be delivered to defendant's son, at his request, would be paid for.

But within a week from the date of this guaranty, the son obtained from the plaintiff lumber to the value of \$226, on the faith of this guaranty, this being the full amount that he then asked for; and this amount he has since fully paid for. The only question arising on the demurrer to plaintiff's petition is, whether the guaranty in question is a *continuing* one, referable by its terms to other and subsequent sales of lumber, made by plaintiff to defendant's son, or whether its terms limit it to a single transaction.

We see no good reason why contracts of warranty should not be construed by the rules applicable to the construction of contracts generally. As contracts by which the guarantor assumes the position of a surety, and becomes responsible for the default of his principal, there would seem to be good reason for not holding him liable beyond the express terms of his agreement; and on the other hand, there can be no good reason why a guarantor, who procures a credit to be given which would have otherwise been refused, should not be held liable to the full extent warranted by the terms of the guaranty. In all written contracts, we think the language of the parties should be so construed as to give effect to their clearly ascertained intention. And as an additional rule, we think it well settled that all contracts, in which the terms are in any respect equivocal, should be read in the light of the circumstances under which they were entered into. This is to be done, not for the purpose of varying the intention of the parties, as disclosed by the writing, but of ascertaining what the parties, in fact, meant by the doubtful language employed for the expression of their intention. The language of the guaranty in this case is, "Please send my son the lumber he asks for, and it will be all right."

There is no express limit to the quantity of lumber to be furnished. This is left to depend solely on the pleasure of the pur-

chaser. But it may well admit of doubt whether it contemplates more than a single purchase. Its language is in the present tense. And it might therefore be held that this language embraces only such lumber as the guarantor's son should ask for, upon the presentation of the guaranty. And as it contains no express reference to future transactions, such, we think, should be its construction, if read without regard to the circumstances under which it was written, or acted upon. And in support of such a construction, it is certain that many authorities, both English and American, might be cited. In order, therefore, to extend the meaning of this guaranty beyond the necessary import of its terms, the petition under consideration states that it was written and acted upon under certain circumstances which are supposed to give its language a meaning that it would not otherwise import. But looking to all the circumstances stated in the petition, we think they are not sufficient to give the guaranty relied on a more extended meaning than its terms would ordinarily import. It is averred that the guarantor knew that his son was about engaging in the lumber business, which he expected to carry on for several seasons. But the writing contains no reference to that fact; and it is not averred that the son expected or intended to make a series of purchases of lumber from the plaintiff, and that this fact was known to the father. It is also alleged that the plaintiff, from time to time, furnished to the son the different bills of lumber stated in their account, in reliance upon this guaranty. But it is not alleged that this fact was, during this time, known to the father, or acquiesced in by him. Had such been the fact, it would be a practical construction of his contract, by the guarantor, which we might well adopt and enforce.

Looking then to the language of the guaranty, its operative words are: "Send my son the lumber he asks for, and it will be all right." This language clearly imports that the father knew that his son was desirous of procuring some lumber from the plaintiff upon credit. He clearly intended to procure such credit for his son by guaranteeing payment for such lumber as his son should ask for and obtain upon the presentation of the writing to the plaintiff. And we think it does not clearly import more than this. The guaranty is coextensive with the order or direction given, and this order was fully complied with when the plaintiff, upon its presentation, sold and delivered to the son the lumber which he then asked for.

Many cases might be cited in which similar language has been

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confined in its interpretation to a single transaction. *Whitney v. Groot*, 24 Wend. 82; *Gard v. Stevens*, 12 Mich. 292; *White v. Reed*, 15 Conn. 457; *Anderson v. Blakely*, 2 W. & S. 237.

On the other hand, cases are not wanting in which guaranties no more comprehensive in their form of expression have, under the circumstances of the case, been construed as continuing.

Upon this subject, it has been well said, that "the chief difficulty lies in determining what interpretation should be put on a guaranty which is so worded that it may either extend to a series of sales or advances, or be limited to the first. The better opinion would seem to be that such an instrument should be confined to the immediate transaction, unless the language of the promise is sufficiently broad to show that it was meant to reach beyond the present, and render the guarantor answerable for future credits. The tendency of decision in this country has, accordingly, been against construing guaranties as continuing, unless the intention of the parties is so clearly manifested as not to admit of a reasonable doubt." *Lent v. Padleford*, 2 Am. Lead. Cas. 141; citing *Congdon v. Read*, 7 R. I. 576; *Gold v. Stevens*, 12 Mich. 292; *White v. Reed*, 15 Conn. 457; *Whitney v. Groot*, 24 Wend. 82; *Webb v. Dickerson*, 11 id. 62; *Aldrich v. Higgins*, 16 S. & R. 213; *Anderson v. Blakely*, 2 W. & S. 237.

We are of opinion that the judgment of the Court of Common Pleas should be affirmed.

Judgment affirmed.

BERKMEYER V. KELLERMAN.

(32 Ohio St. 239.)

Fraud — constructive — minor and persons in loco parentis.

A conveyance by a minor, on the day he comes of age, of all his real estate to a person occupying the relations of parent and guardian of such minor, in execution of a settlement made for such minor by others not authorized to bind him, and while he is still under his influence and control, and not advised of his rights, is not binding, and can only be upheld in a court of equity by clear proof that under all the circumstances it is just and equitable, and the burden is on the claimant to show the utmost good faith.*

* See *Darlington's Appeal* (86 Penn. St. 512), 27 Am. Rep. 726; *Boyd v. De la Montagne*, 73 N. Y. 409, 29 Am. Rep. 197; *Jacox v. Jacox*, 40 Mich. 473; s. C., 29 Am. Rep.

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ACTION to set aside a deed made by Lisette Berkmeier before her marriage. The opinion sufficiently states the facts. The defendant had judgment below.

Stanton & Richards, for plaintiffs in error.

T. D. Lincoln, for defendants in error. The burden of proof was on the plaintiffs. *Delano v. Bartlett*, 6 Cush. 366, 367; *Bridge Co. v. Butler*, 2 Gray, 131, 133. A child may make even a voluntary conveyance of its property to its father or mother, if it acts freely and voluntarily. *Jenkins v. Pye*, 12 Pet. 243; *Taylor v. Taylor*, 8 How. 201; *Bergen v. Udall*, 31 Barb. 25; 1 Story's Eq. Jur., § 309a. A family settlement of matters proper for the child to recognize and pay will be sustained if there has been no fraud practiced. *Stapilton v. Stapilton*, 1 Atk. 5; *Cory v. Cory*, 1 Ves. Sr. 19; *Kinchant v. Kinchant*, 1 Brown's Ch. 374; *Gordon v. Gordon*, 3 Swanst. 463; *Hartopp v. Hartopp*, 21 Beav. 262; *Hoghton v. Hoghton*, 15 id. 300; *Wycherley v. Wycherley*, 2 Eden's Ch. 178; *Pullen v. Ready*, 2 Atk. 587; *Green v. Goodall*, 1 Cold. 409.

JOHNSON, J. The deed sought to be set aside was executed September 1, 1859. The legal title to the premises was then in the plaintiff, Lisette, and the defendant, her mother, the former holding two undivided thirds. It had been so placed with the assent of the mother in 1846. By the deed from Tucker at that time, she took according to her husband's will one-third in fee, instead of her dower under the statute. The day Lisette became of age, the deed now in controversy was executed by Lisette to her mother and her step-father, Joseph Kellerman, in consummation of an alleged family settlement, made by A. M. Dengler, an attorney, selected by the mother for that purpose, who came to the conclusion that Lisette was only entitled to six hundred dollars out of her father's estate (the Mercer county land not included). Under the employment of the mother, he made what he calls a settlement, and adjudged that the step-father should have a deed for half of this property, and the mother the other half, and that they should jointly make a mortgage to Lisette to secure the payment of this \$600, in two years, with six per cent interest.

The settlement and award was made, and the necessary papers prepared for execution before Lisette became of age, without any consultation with her, and without her knowledge, until on her

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way, with her mother, and by her directions, to Dengler's, to execute them.

To carry out Dengler's award, he had prepared a deed, whereby Kellerman and wife conveyed all their title, being the one-third, to Lisette, and she conveyed to them jointly the whole title. They then executed back to her a mortgage to secure the \$600 awarded to her, which was evidenced by note.

As Mrs. Kellerman already owned one-third, the effect of this transaction, was to increase her interest in the lot one-sixth, and to increase Kellerman's from a marital right as husband in his wife's one-third to an ownership in fee of one-half.

The evidence warrants us in finding that the occasion for this transaction arose from the dissatisfaction of the step-father, growing out of the fact that he had been engaged then some thirteen years, helping, as he claims, to save and improve this property. He naturally valued his efforts and labors as the chief cause of its value, and was of the opinion that Lisette was not entitled to any thing more than she had received in her raising.

It also warrants us in finding, that to the industry and good management of the mother, before she married Kellerman, this estate of her first husband was kept together and saved to herself and her children, and that she was a kind, self-sacrificing mother and wife, anxious to do equal and exact justice to her husband as well as to her child. She recognized and was anxious to satisfy the equitable demands of her dissatisfied husband, and accordingly some days before Lisette became of age, doubtless after consultation with her husband, she employed Dengler to adjust this family difficulty, and told him all the circumstances as far as she knew them, and told him "to settle it right by me (her), *and right by my husband*, and right by her" (Lisette). This Dengler attempted to do without any communication with Lisette, or without any accounts or vouchers, or any computation in details of the value of the claims of either party. He had acquired a general knowledge of the matter, but he does not claim to have done more than to make a general examination, and to make what he deemed an equitable award.

What demand the step-father had against Lisette to require that she should convey one-half of this land to him does not clearly appear from the evidence. The first that Lisette knew of what was being done was after the deeds were ready to be signed, and

CASES
IN THE
SUPREME COURT COMMISSION
OF
OHIO.

HARE V. GIBSON.

(33 Ohio St. 33.)

Marriage — wife's necessities pending action for divorce — alimony.

Where a wife is living separate and apart from her husband, and in a suit against him for divorce and alimony, has obtained a decree fixing the amount of alimony to be paid by the husband for her sustenance during the pendency of her petition, and the husband is not in default in respect to the payment of the alimony so allotted, he is not liable for necessities subsequently furnished at her request during the pendency of her petition.

Persons dealing with the wife, under these circumstances, do so at their own peril, and are chargeable with knowledge of the allotment and payment of the alimony.*

The adequacy of the alimony decree in such case cannot be collaterally drawn in question, especially by a stranger to the suit.

ACTION on account. The opinion states the facts. The judgment of the trial court was for defendant, but was reversed by the District Court.

D. D. Hare, for plaintiff in error.

SCOTT, J. Defendant in error brought his action, to recover of the plaintiffs in error the amount of an account for medical serv-

*See *Olson v. Heritage* (45 Ind. 73), 15 Am. Rep. 253.

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ices and care bestowed by him as a physician in attendance upon the wife of their intestate. The action was brought originally before a justice of the peace of Wyandot county, and came into the Court of Common Pleas by appeal. A copy of his account was attached to his petition, and the items were from July 18th till October 28, 1869, and amounted in the aggregate to \$48. The defendants below answered, admitting that the services stated in the petition were rendered for the wife of their intestate, but denying that such services were rendered at the instance of the deceased, Levi Hare. Further answering, they say "that at and during the time when the services mentioned in the petition are claimed to have been rendered, the said Rebecca Hare was living separate and apart from her husband, the said Levi Hare, against whom she was prosecuting, in the Court of Common Pleas of Seneca county, a suit for divorce and alimony, which suit was still pending and undetermined at the death of said decedent, December 11, 1869.

That on the 22d day of June, 1869, after said suit had been instituted, on motion of said Rebecca Hare, a decree for alimony pending said suit was made by said court and duly entered upon the journal thereof, granting to the said Rebecca Hare an allowance of one hundred and seventy-five dollars as such alimony.

Said alimony was by said decree made payable in installments, as follows, to wit: twenty-five dollars in ten days from the date of said decree; twenty-five dollars on the 21st day of August, 1869; twenty-five dollars on the 21st day of September, 1869; and one hundred dollars on the 21st day of October, 1869.

Every installment of said alimony was paid by the said Levi Hare on or before the day when the same became due, and all of said alimony had been fully paid before the 28th day of October, 1869."

To this answer the plaintiff below replied, alleging that he had no knowledge of the granting of said alimony or of its payment, and averring "that at the time of the allowance of said alimony, the said Rebecca A. Hare was in ordinary health; was able to and did perform her own work and labor, and such allowance was made to said Rebecca A. Hare for her maintenance, with the knowledge that said Rebecca Hare was then in such ordinary health, and so able to perform her work and labor.

"That in making said allowance, the costs, expenses, and attorney fees incident to the proper preparation of said cause of said.

that connection, it will be set aside. Such relations are those of attorney and client, parent and child, guardian and ward," etc.

In *Harrison v. Guest*, 6 De G. M. & G. 424, the lord chancellor says: "If persons standing in a particular relation to one another deal as vendor and purchaser, the court expects the purchaser, when the purchase is complained of by the seller, to show that the seller had due protection afforded him. * * * Wherever there is any fiduciary relation between the parties, the court throws the burden of proof on the party who sets up the transaction against the person whom he was bound to protect."

In *Cocking v. Pratt*, 1 Ves. Sr. 400, the court said: "Though there is no great evidence of undue influence, yet the court will always look with a jealous eye upon a transaction between parent and child just come of age, and interpose if any advantage is taken. The mother plainly knew more than the daughter, and only says in general terms she believes she concealed nothing from her." And a composition between mother and daughter, entered into four months after the latter came of age, though afterward ratified by the daughter's husband, was set aside.

"A trustee will not be permitted to obtain any profit or advantage to himself in managing the concerns of his *cestui que trust*, but whatever benefits or profits are obtained will belong exclusively to the *cestui que trust*. In short, it may be laid down as a general rule, that a trustee is bound not to do any thing which can place him in a position inconsistent with the interest of his *cestui que trust*, or which will have a tendency to interfere with his duty in discharging it. And this doctrine applies, not only to trustees strictly so called, but to other persons standing in like relations. * * * It applies in like manner to executors and administrators, who are not permitted to purchase up the debts of the deceased on their own account; but whatever advantage is thus derived by them, by purchases at and under value is for the common benefit of the estate. Indeed, the doctrine may be more broadly stated, that executors or administrators will not be permitted, under any circumstances, to derive a personal benefit for the manner in which they transact the business, or manage the assets of the estate." 1 Story's Eq., § 322. See, also, § 322 a, and §§ 466, 466 a, and 468.

Another rule applicable to transactions of this kind is, that there is no law against a child bestowing upon a parent any property of which she may be the owner, if freely and voluntarily done, when

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the gift originated in the mind of the child, or was unsuggested by any agency of the parent. *Bergen v. Udall*, 31 Barb. 25; Story's Eq. Jur., § 309a.

In *Gordon v. Gordon*, 3 Swan., Lord ELDON says, that "in all cases of this kind full and complete communication of all material circumstances is what the court must insist on." Again: "There must not only be good faith and honest intentions, but a full disclosure; and without full disclosure, honest intention is not sufficient."

In *Bergen v. Udall*, *supra*, it is said: "In all dealings between parent and child, under such circumstances, the most scrupulous good faith — *uberrima fides* — must be observed, and the weaker party must be put upon an equal footing with the stronger, by a complete disclosure of all material facts, and the abnegation, as far as possible, of any control or dominion, as well as of all mere selfish projects or attempts."

That class of cases where family settlements are sustained, notwithstanding some proof of parental influence, and those where contracts will be set aside because of such undue influence, are readily distinguishable, and that distinction rests on sound principles of equity and justice.

In both classes, where, from the relations of the parties, there is a probability of such undue influence having been exerted, the court watches the whole transaction with great jealousy, not merely for the purpose of ascertaining "that the person likely to be so influenced fully understood the act he was performing, but also for the purpose of ascertaining that his consent to perform that act was not obtained by reason of the influence possessed by the person receiving the benefit; not that the influence itself flowing from such relations is either blamed or discountenanced by the court; on the contrary, the due exercise of it is considered useful and advantageous to society; but this court holds as an inseparable condition that this influence should be exerted for the benefit of the persons subjected to it, and not for the advantage of the person possessing it. The case of parent and child is undoubtedly one of this class of cases, and is promptly put forward as such in all cases illustrating the principle." *Hogton v. Hogton*, 15 Beav. 278.

In this case it was added "that if the settlement of the property be one in which the father acquires no benefit not already possessed by him, and if the settlement is a reasonable and proper one, the

court will support it, even though it may appear that some influence was exerted by him to induce the son to execute it, and provided, also, there was no suppression of what is true, or suggestion of what is false. * * * When, however, the son confers on the parent, by the transaction, some advantage which he did not previously possess, then the principle which prevails in the first class of cases interposes, and this court, to use the words of Lord LANGDALE, in *Archer v. Hudson*, 7 Beav. 560, does not interfere to prevent an act even of bounty, between a parent and child; but it will take care that such child is placed in such position as will enable him to form an entirely free and unfettered judgment, independent altogether of any control."

Guided by these principles, we are unanimous in the opinion that this deed, made on the day that Lisette became eighteen years old, in execution of an alleged settlement, made by one unauthorized to bind her, without her being fully advised of her rights, and while acting under the influence and control of her mother and stepfather, was not binding upon her.

[Omitting a branch of the case upon which judgment as to another party was affirmed.]

Judgment reversed.

SHINDELBECK v. MOON.

(33 Ohio St. 234.)

Landlord and tenant — responsibility for injury arising from premises becoming out of repair.

Upon leased premises, a water-pipe and gutter, not defective in their original construction, became stopped up, so that the water flowed upon the door steps of the leased house, forming ice, upon which a third person fell and was injured. As between lessor and lessee, in the absence of contract to the contrary, it is the duty of the latter to repair the pipe, or remove the ice, and for failure in this he is liable, and not the landlord.*

ACTION for personal injury. The opinion states the facts. The defendant had judgment below.

Henry Newbegin, for plaintiff in error, cited *Irvine v. Wood*, 51 N.Y. 224; *Anderson v. Dickie*, 26 How. Pr. 105; *Shearm. & Redf. on*

* See *Mellen v. Morrill*, post.

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Neg., § 511; *Carpenter v. Gynn*, 39 Barb. 400; *Linsley v. Bushnell*, 15 Conn. 225; *Irvin v. Fowler*, 5 Robertson, 482; *Osborn v. Union Ferry Co.*, 53 Barb. 629; *Doyle v. Mulrein*, 1 Sween. 517; *Congreve v. Smith*, 18 N. Y. 79; *Creed v. Hartman*, 29 id. 591; *Sexton v. Zett*, 44 id. 430; *Whalen v. Gloucester*, 4 Hun, 24; *Leary v. Woodruff*, id. 99; *Clancy v. Byrne*, 56 N. Y. 129; *Kessel v. Butler*, 53 id. 612; *Lane v. Atlantic Works*, 107 Mass. 105; *Hewison v. New Haven*, 34 Conn. 136; *Rylands v. Fletcher*, E. L. R., 3 H. L. 330; *Townsend v. Corning*, 23 Wend. 445; *Ploelcher v. Mayor*, 55 N. Y. 666.

S. T. Sutphen, for defendant in error.

WRIGHT, J. The petition and demurrer involve questions relating to the liability of landlord and tenant, lessor and lessee, where a third person has been injured in consequence of some defect in condition of the premises. Moon was the owner of certain property in the village of Defiance, which he had leased to Brooks, who was in possession of and using the same for a post-office. A pipe or gutter attached to the building had become obstructed or stopped up, and the water, instead of running through it, flowed over the roof. This water falling upon the steps of the post-office, in winter, ice was formed. Coming from the post-office, plaintiff stepped upon this ice, fell, and was hurt. Moon, the landlord, and Brooks, the tenant, were both sued. Brooks was dismissed from the action, and the question to be decided is, is Moon, the landlord, liable upon the statements made in the petition?

The liabilities arising from the relation of landlord and tenant are these: Liability generally accompanies occupation, and when a landlord leases and parts with the possession his liabilities are in certain instances devolved upon the tenant.

The principle which runs through cases, determining the responsibility of the one or the other, may be thus defined: Whoever had control of the premises at the time the cause of injury originated, that person is liable in damages; which simply means that the party in fault must respond.

Hence it is that where, at the time of the lease, the property is in a ruinous or defective condition, and by reason thereof the injury happens, then the owner or lessee is liable generally, though there are cases which make this liability dependent upon the covenants of the lease. And upon the other hand, when this defective

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condition arose after the lease, then the tenant is responsible, with, perhaps, exceptions upon covenants. And when there has been a nuisance of continued existence, lessor and lessee may both be liable for damages resulting therefrom. The lessee in actual possession of the premises, if he continues the nuisance after notice of its existence, and notice to abate it; the lessor, if he at first created it and demised the premises with the nuisance upon them, and at the time of the damage done is receiving a benefit therefrom by way of rent or otherwise.

In *Roswell v. Price*, 12 Mod. 635, it is held that if an owner erect a nuisance, for which damages are recovered, and the nuisance is continued in the hands of his lessee, an action for the continuance of it may be against either. Here the nuisance or original trouble was occasioned by the owner, and he is held responsible, even after the lease. The court say that both may be liable, the landlord for originating, and the tenant for continuing. It is said, in the case, that the erector of the nuisance cannot discharge himself by assigning over, and more especially when he grants over, reserving rent, by which he continues the nuisance, having a recompense for it in such rent.

This case illustrates the idea that control is the criterion of responsibility, for control means that power which occasions and which can prevent. The nuisance was erected, that is, originated, by the owner, who manifestly should, therefore, be responsible for its consequences.

But it will be observed that not only the owner, but the tenant also, is held liable, upon the ground that every continuance of a nuisance is a fresh nuisance. Taylor's Land. & Ten., § 175; *Vedder v. Vedder*, 1 Den. 257; *Little Miami R.R. Co. v. Comm'rs Green Co.*, 31 Ohio St. 338. This fresh nuisance the tenant might abate, if he saw fit, being in control of the premises, and, for failure in this, he is responsible.

In *Todel v. Flight*, 9 C. B. (N. S.) 377, Scott, C. J. (N. S.), there was a demurrer to a declaration. Defendant leased to a tenant a lot on which stood a stack of old chimneys in a ruinous and dangerous condition at the time of the lease, and defendant knew it and so maintained them. The chimneys fell on plaintiff's house, and defendant was held liable in the declaration.

EARLE, J., says, p. 390: "It is alleged that the defendant let the houses when the chimneys were known by him to be ruinous

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and in danger of falling, and that he kept and maintained them in that state, and thus he was guilty of the wrongful non-repair which led to the damage, and after the demise the fall appears to have arisen from no fault of the lessee, but by the laws of nature."

The owner of premises who leases them when they are in such want of repair or bad condition as to be a nuisance, or when, from the ordinary course of events, they must become so, and receives rent for their use, is liable to a third person for injury happening in consequence of this defective condition or nuisance. In such case the landlord had the control of the property at the time the trouble was occasioned, and he might have removed it.

It is the party who does the wrong who should be made responsible for the consequences it entails.

But if the nuisance arises solely from the act of the tenant, the landlord cannot be held. *Owing v. Jones*, 9 Md. 108; *Staple v. Spring*, 10 Mass. 72; *Waggoner v. Jermaine*, 3 Den. 306; *Fish v. Dodge*, 4 id. 311; *House v. Metcalf*, 27 Conn. 632; *Smith v. Elliot*, 9 Barr, 345.

Rich v. Basterfield, 4 C. B. 783, was a case much discussed and decided for plaintiff at *nisi prius*, but unanimously reversed in full court. The owner of a house standing back from the street built a low shop between his house and the street, with a chimney, and rented out the shop. The tenant used the chimney for a fire, and when the wind was from the east or south-east smoke was blown into the plaintiff's windows, causing him great annoyance. Defendant, the owner, was sued on the ground that he built the chimney, which made the nuisance, and was answerable for the ordinary use of it.

The court held that the chimney itself was not a nuisance, but it was the fire made by the tenant; that coke might have been used, or he might have abstained from having a fire when the wind was in the wrong direction, and the owner, therefore, was not liable. He had no control of the fire.

Upon the other hand, in *House v. Metcalf*, 27 Conn. 632, an owner had leased a mill situate so near the highway that its revolving wheel frightened horses. The owner was held responsible, although it would seem that not the mill itself, but its operations in the hands of the tenant, occasioned the difficulty.

Gandy v. Jubber, 5 Best & Smith, 485: A grate over the sidewalk, long there, had the bars so wide apart that a woman slipped

her foot through and lamed herself. The premises were rented at the time from year to year, and the landlord, the heir of the original owner and builder, was held liable, on the ground that the grate was a nuisance in its original construction. Declaration avers that the tenant "was *not* under obligation to alter, repair and keep in repair," and that it had been many years so that one might fall through. The jury found that the grate was a nuisance, "both from the faultiness of its construction and from want of repair." CROMPTON, J., says: "It must be a nuisance in its very *nature* and *essence* at the time of the letting, and not merely something which is capable of thereafter being rendered a nuisance by the tenant." Blackburn says: "The nuisance must be a normal one."

This case was reversed in the Exchequer, 9 Best & Smith, 15. It is, however, there said that "to bring liability home to the owner, the premises being let, the nuisance must be one which was in its very nature and essence a nuisance at the time of the letting, and not something which was capable of being thereafter rendered a nuisance by the tenant, and that it is a sound principle of law that the owner of property, receiving rent, should be liable for a nuisance existing in his premises at the date of the demise;" and the judgment of the Queen's Bench is reversed on the ground that "it is not averred, either directly or by any reasonable inference, that the grating was defective at the time of the letting."

Wharton on Neg., § 817, says: "An owner, being out of possession, and not bound to repair, is not liable in this action for injuries in consequence of his neglect to repair. But where the nuisance existed when the property was leased to the tenant, the landlord may be held liable. So the tenant is liable for the nuisance thus retained by him, even though the nuisance was on the premises when leased to him. And both the landlord and tenant, under the circumstances, are jointly and severally liable for the continuance of the nuisance, supposing the nuisance to be on the property when leased, or to be put there with the landlord's connivance."

The City of Lowell v. Spaulding, 4 Cush. 277, was a case for damage to plaintiff by falling into a space left open in the sidewalk, where it was held that the occupant, and not the landlord, is bound, as between himself and the public, so far to keep the buildings in repair that they will be safe for the public, and such occupant is,

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prima facie, liable to third persons for damages arising from any defect. If there is an express contract that the landlord shall repair, suit will be sustained against him to avoid circuitry of action.

The occupier is, *prima facie*, liable, and the owner is not, merely as owner, without fault on his part. *Russell v. Shenton*, 43 E. C. L. R. 449.

There is another large class of cases that would seem to be not entirely in accordance with the view that has been advanced, though perhaps the difference is more in appearance than reality. They are cases where the liability is devolved in accordance with the covenants of the lease and made to accompany the duties it imposes. If the defect existed prior to the lease, and by its provisions, the tenant assumes the responsibility of keeping the premises in repair, it has been held that the landlord was not responsible.

In the early case of *Payne v. Rogers*, 2 H. Bl. 350, the head-note is: "If the owner of a house is bound to repair it, he, and not the occupier, is liable to an action in the case for an injury sustained by a stranger from a want of repairs."

This was an action against the owner of a house, in the occupation of a tenant. It does not seem to have been made a point in the case, whether the defect arose before or after the demise, a question, important, as we have seen, in cases not involving the element of covenants in the lease. This case is made wholly to turn upon the agreement, as to repairs, between the landlord and tenant. And the landlord, having bound himself to the tenant to repair, is made liable for the injury. Although nothing is said in the case about who had the control of the premises, and though the facts do not show in whom that control was, when the defect occasioning the injury originated, still it may be perhaps fairly said, that by binding himself to repair, the owner retained such control as would enable him to make those repairs. This view is sustained by the language of the court in *Burdick v. Cheadle*, 26 Ohio St. 393. "But in case a landlord undertakes with his tenant to keep the premises in repair, having thus reserved the control to the extent necessary for making repairs, his duty to the public in relation to the property is not affected by the lease, and he remains responsible, under the doctrine of the above maxim (*sic utere*, etc.), for defects arising from the want of repairs during the continuance of the lease."

In the case of *Pretty v. Bickmore*, L. R., 8 C. P. 401, the tenant

had covenanted to repair. The premises were dangerous at the time of the demise. But it was held that the landlord was not liable, because of the tenant's covenant. This case is disapproved of in *Swords v. Edgar*, 59 N. Y. 28; s. c., 17 Am. Rep. 295, although it is followed up by the case of *Gwinnell v. Eamer*, L. R., 10 C. P. 658. See, also, *Leonard v. Storer*, 115 Mass. 86; s. c., 15 Am. Rep. 76; *Shipley v. Fifty Associates*, 106 Mass. 194; s. c., 8 Am. Rep. 318; s. c., 101 Mass. 251; s. c., 3 Am. Rep. 346; *Shear. & Red. on Neg.*, §§ 501, 502; *Whalen v. Gloucester*, 4 Hun, 24 and 99; *Nelson v. Liverpool, etc., Co.*, L. R., 2 C. P. Div. 312. It is not, however, necessary, nor do we undertake to decide as to any of the rights or liabilities which subsist by reason of the covenants of leases. What the terms of the letting in this case are, we have no means of knowing, nor are we advised whether the landlord or tenant undertook to repair. The remarks made apply only to such cases as involved no consideration of the agreement by which the demise was made, other than the mere fact of its existence.

The lessor is not liable to a stranger for an injury arising out of the property being out of repair, unless under special circumstances, such as a covenant with the lessee to make the repairs. *Bears v. Ambler*, 9 Barr. 193.

If the owner, as distinct from the occupier, is sued for damages, arising from a falling wall, a special ground of liability must be averred, other than mere ownership. The public looks to the occupier, not to the estate. *Chauntler v. Robison*, 4 Exch. 163.

“Where property is demised, and at the time of the demise is not a nuisance, and becomes so *only* by the act of the tenant, while in his possession, and injury happens during such possession, the owner is not liable.”

But where the owner leases premises which are a nuisance, or must, in the nature of things, become so by their uses, and receives rent, then, whether in or out of possession, he is liable for injuries resulting from such “nuisance.” *Owings v. Jones*, 9 Md. 108; *Fish v. Dodge*, 4 Den. 311; *Hadley v. Taylor*, L. R., 1 C. P. 53; *Fiske v. Framingham Mem. Co.*, 14 Pick. 491; *Cheetham v. Hampson*, 4 T. R. 318; *Norton v. Wiswall*, 26 Barb. 618.

A well-considered case upon this subject is found in *Swords v. Edgar*, 59 N. Y. 28; s. c., 17 Am. Rep. 295. Defendants were owners of a pier, which was under lease. A laborer engaged in discharging the cargo of a steamer was injured by reason of the

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pier falling, through rottenness of its timbers. The defect existed at the time the lease was made. It is held that ordinarily it is the duty of the occupant to see that the premises are secure, but where they are leased, and at the time of the demise and delivery of possession to the lessee they are in a defective and unsafe condition, and in consequence thereafter, while in possession of the lessee, an injury happens, the lessor, who is receiving a benefit by way of rent or otherwise is liable. And the owner or lessor was held responsible.

In this case, as in many others that might be cited, we find the same principle, and it is thus stated in *Fisher v. Thirkell*, 21 Mich. 1; s. c., 4 Am. Rep. 422. "A party will not be liable for an injury occasioned by a nuisance, on the ground of his possession of the premises, where the nuisance is shown to exist, unless his possession be such as to give him the legal control of the premises."

This was the case of a person injured by falling through a coal-hole in the sidewalk, and the question was whether the landlord or tenant was liable.

When the landlord has leased premises, he parts with control of them; with possession that control passes to the tenant, and if defect arises, or want of repair, or the premises are allowed to get into such a condition as that they become dangerous during the demise, it is the duty of the tenant to take such steps as will prevent injury. The liability arising from the control of premises, is illustrated in that large class of cases where contractors build houses. If the premises are completely given up to the contractor, he will be responsible to one injured during the progress of the work. If, on the other hand, the owner retains supervision, and the building goes on under his direction, as he is in control of the premises, his responsibility continues; the contractor or builder then stands, to him, in the relation of servant. And there are many nice cases as to whether the party is an independent contractor or servant merely.

It is, however, not necessary to enter into this discussion. The principle of control and its accompanying liability is sufficiently illustrated in *City of Cincinnati v. Stone*, 5 Ohio St. 38.

The city contracted with B. to grade a street, and in doing this he blocked the water so that it flowed over Stone's ground, doing damage. The city was held liable on the ground that by the contract she reserved the right to direct the manner of doing

the work. The syllabus says when the employer retains control and direction of the work, and injury happens, he will be responsible. *Clark v. Fry*, 8 Ohio St. 358; *Gwathmey v. L. M. R. R. Co.*, 12 id. 92.

The principle suggested is recognized in *Burdick v. Cheadle*, 26 Ohio St. 393; s. c., 20 Am. Rep. 768. In that case the person injured was in the store, upon the invitation of the tenant, or as a customer, and was not a stranger, maintaining his rights as one of the public. It is held that if one invites another into danger and hurt, the sufferer must seek his remedy against the party inviting him. That he cannot maintain an action against another must be apparent from the fact that if he had not accepted the invitation he would not have been injured. In *Burdick v. Cheadle*, the court, in discussing the maxim, "*sic utere*," etc., observes: "The principle ordinarily applies only to persons in possession and having control of the property, either as owners or tenants."

The rule, therefore, deducible from the authorities, and which is applicable to the case in hand, is this: A landlord who is out of possession of the premises by virtue of a demise, and who has no control over them, who would not have the right to enter therein, even to make repairs, without his tenant's consent, is not liable for accidents occasioned by the fact that the property is temporarily out of repair.

If the defect is inherent in the original construction, and this occasions the injury, then the landlord or lessor is responsible; but when the defect arises after the lease, then the tenant is responsible.

Examining the amended petition, therefore, we find this alleged: Moon was the owner and Brooks the lessee and possessed of the premises, using and keeping them as a post-office. It is then averred that the water-pipe or gutter became filled and obstructed, and the water fell from the roof upon the steps leading from the post-office to the sidewalk. This froze, and the plaintiff slipped on the steps and fell. The cause of the injury is the stopping up of the pipe. It is not alleged that there was a fault in its original construction, but it would appear to be one of those obstructions that may occur at any moment. It is not averred that this obstruction existed before the demise was made, and such an averment is necessary before the landlord can be held. If it occurred after the demise it is the duty of the tenant or occupier to see that such obstruction was removed. The petition, therefore, lacks the

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necessary averments to show that the landlord is liable, as it does not show a defect while the premises were in his control before he leased, and for which alone he is responsible. All facts necessary to raise a legal liability must be strictly averred. *Metcalf v. Heatherington*, 11 Exch. 257.

And again, it was the ice that occasioned the accident. It is not averred that it was the duty of the landlord to remove this ice, nor does it appear that he had such control of the premises as called upon him to do it. If this ice was a nuisance to the passing public, endangering their lives and limbs, it was a nuisance arising during the continuance of the lease. It was a thing temporary in its nature, a defective condition of things, such as the tenant was called upon to remedy, and not the landlord, as between landlord and tenant.

Judgment affirmed.

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(32 Ohio St. 299.)

Infancy — how parents may confer right to custody of minor children.

Where the father and mother, living apart, by agreement transfer the care and custody of their infant children to the grandfather of the children, in consideration that he will receive, care, and provide for them, and in pursuance of such agreement he does take them in charge, the custody of the grandfather is lawful, and he has legal capacity to maintain an action for damages against one who wrongfully takes or causes them to be taken from his custody, without showing actual loss of services.

ACTION of damages. The petition was as follows: "The said Edward B. Clark says, that at the time of the commission of the wrongs hereinafter stated by the defendants, he had two grandchildren, to wit: Edward J. Clark and Ada H. Clark, who were the children of the plaintiff's son, Edward B. Clark, Jr.; that on or about the 21st day of August, 1872, the father and mother of said children, then living separate and apart, and not being in a condition to take care of the said children, Edward J. and Ada H., who were both minors, under the age of five years, transferred the care, custody and possession of said children to the plaintiff, and wholly renounced and abandoned all right as parents to the custody and

possession of said children, in favor of the plaintiff; and at the same time, in consideration of the said transfer and abandonment, the plaintiff accepted the care, custody and possession of said children, in order to bring up, maintain, protect and educate his said grandchildren as his own children; and in consideration of the matters just stated, the plaintiff, at the time aforesaid, and in the county aforesaid, took said children to his own home, where he had the sole care and custody of them, and was supporting them and bringing them up as his own children; and from said date until the 26th of April, 1873, the plaintiff and his family did take care of and support, maintain, instruct and expend money upon the said children for the purpose of discharging his duty as a parent toward them; nevertheless, the defendants well knowing the premises, and intending, at the date last named, to deprive the plaintiff of the custody, possession and services of said children, and to injure him, wrongfully, without consent or authority, and forcibly took possession of said children at said county, and carried them out of said county into other counties in this State and concealed them, one of them being concealed by them at Columbus and the other at Cleveland, in Ohio; and the plaintiff says that he was put to great loss of time and expense of money in searching for said children; that he was engaged for the period of two weeks in searching for them, and employed officers to aid him, and a lawyer to prosecute suits, in order to obtain possession of the said children; and he incurred liabilities in regard to the said matter to the amount of two hundred dollars; and he says that while the said children were so absent from his custody, and hidden, they were neglected, abused, and ill-treated, by the persons who had them in their hands so that they became feeble and sick, and the plaintiff was obliged to nurse, take care of, and endeavor to cure them; and the plaintiff alleges that the defendants, at the times aforesaid, were, and yet are, husband and wife. To the damage of the plaintiff in the sum of five thousand dollars, and for which sum he asks a judgment. Defendants demurred and had judgment.

Henry F. Page, for plaintiff in error.

Harrison & Olds, and *A. T. Walling*, for defendant in error. For reasons of public policy, the father cannot divest himself of his paternal obligations, or transfer his paternal rights to another, ex-

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cept in the modes provided by law. An agreement made in any other way, by which the father surrenders custody of his child to another, is not binding. *Reg. v. Smith*, 17 Jur. 24; *People v. Mercein*, 3 Hill, 399; *Hunt v. Hunt*, 4 G. Green (Iowa), 216; *Vansittart v. Vansittart*, 4 Kay & Johns. 62.

ASHBURN, J. It is claimed the errors assigned on the record do not raise the question on the demurrer.

The manner in which errors are assigned should not induce a court of review to overlook questions of real merit in a case. Reviewing courts are not required to embark on a voyage to discover errors not specifically assigned. Where, however, the real question in a case is manifest, as in this case, the question will not be overlooked.

The demurrer is special and general. Three grounds of demurrer are alleged.

I. Plaintiff has not legal capacity to sue.

II. Misjoinder of parties defendant.

III. The petition does not state facts sufficient to constitute a cause of action.

In discussing the first question on the demurrer, the third cause will be considered to a considerable extent.

I. Plaintiff's legal capacity to maintain this action.

If plaintiff had the lawful right to and actual custody of the infants at the time of the alleged wrongful act of defendants, he has legal capacity to sue. As we understand the argument of counsel for defendants, they claim the father of these minor children only has a right of action.

In this country there is quite a uniformity in the decisions in relation to the rightful custody of infant children. The general spirit of modern adjudged cases on this subject, both in England and the States, does not essentially differ. As a general rule, the father is considered as being entitled to the custody of his minor children, and in case of his death or incapacity, the mother. In cases of controverted custody, the present and future interests of the minor control the judgment and direct the discretion of courts. While the legal rights of parents are to be respected, the welfare of the minor is of paramount consideration. If necessary to attain that end, the custody of minor children will be taken from their parents or refused to them. *Hurd on Habeas Corpus*, 528; *Tyler on Infancy*, etc., 283.

When the question of custody arises between the father and mother, or between either of them and another, as to rightful custody, and the minor is of an age to make an intelligent and discreet choice, courts will respect the minor's election. When the child is too young to exercise judgment in making a choice, courts are never restrained by any supposed absolute right of custody in either parent, but will direct the custody where the best and highest interests of the infant will be subserved.

It sometimes happens that parents have abandoned their minor children, or by act and word transferred their custody to another. In such cases, where the custodian is, in every way, a proper person to have the care, training and education of the infant, and the court is satisfied its social, moral and educational interests will be best promoted by remaining in the custody of the person to whom it was transferred, or received, when abandoned, the new custody will be treated as lawful and exclusive.

After the affections of both child and adopted parent become engaged, and a state of things has arisen which cannot be altered without risking the happiness of the child, and the father wants to reclaim it, the better opinion is that he is not in a position to have the interference of a court in his favor. His parental rights must yield to the feelings, interests and rights of other parties acquired with his consent.

In this case, for the purposes of the demurrer, it is admitted the father and mother were not in a condition to take care of their infant children, and for that reason transferred the care and possession of both minors to plaintiff, and wholly renounced and abandoned all right, as parents, to the custody of the infants to the plaintiff; that plaintiff accepted and took upon himself their care and custody; that defendant knowing these facts, and intending to deprive plaintiff of the custody, possession and services of the minors, and to injure him, wrongfully, without consent or authority, forcibly took possession of the minor children, and carried them out of Pickaway county into other counties in the State, and there concealed them, etc.

Upon this state of facts, plaintiff, who is the grandfather of the minors, stood to them *in loco parentis*, with title to their custody, which no one could forcibly question with impunity. If these children had been but domestic animals, plaintiff had a lien upon them, which the owner would have been bound to discharge before he

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could assert a right to their custody. As against a wrong-doer, plaintiff had lawful right, if forcibly taken from his possession, to recover them at the costs of the tort-feasor.

Questions, as to the rightful custody of minor children, have generally, in this country, been made in proceedings in *habeas corpus*, where alleged illegal restraint was the chief question for consideration. As, however, the decisions, in such cases, and the clear expressions of judges, have a direct bearing upon the rights of parents and others to the rightful custody of minors, a brief allusion to a few of them will tend to show the spirit of the law and blaze the way to a correct conclusion.

The State ex rel Lynch v. Bratton, decided by the Supreme Court of Delaware, reported in American Law Reg. (N. S.), vol. 15, p. 359, is a case in which there was a contest for the custody of infant children between their father and grandmother. Relator intermarried with *Emma Bratton*, daughter of respondent, and to them three children were born. The father and mother were divorced, and the custody of the children awarded to the mother. In 1870, the mother and children went to live with respondent, and resided with her until 1873, when the mother of the infants died, committing the care and custody of her children to respondent, who accepted the charge. In 1876, relator commenced proceedings to recover possession of his minor children.

After a full and careful review of the authorities, the court held that while the father has *prima facie* right to the custody of his minor children, his right is not an absolute and unqualified right. "He may relinquish or forfeit it by contract, by his bad conduct, or by his misfortune in being unable to grant proper care and support."

Where the father asserts his legal right, and the welfare of his minor child is involved, courts are not embarrassed in asserting their power, in a discreet judgment, as to its proper, and for the time being, lawful custody. In the case of *The State v. Smith*, 6 Greenl. 462, the relator was the father, and the respondent the grandfather of the minor, PARRIS, J., said: "From an examination of the authorities, I consider the law as well settled that it is in the sound discretion of the court to alter the custody of these minor children or not, and that the father cannot claim them as matter of right."

To the same effect is *Dumain and wife v. Guynne*, 10 Allen, 272. CHAPMAN, J., said: "But there are cases where the policy of the

law is best promoted by the separation of children from one or both of their parents."

In *Cone v. Dougherty*, 1 Pa. Leg. Gaz. 63, cited in note to Hurd on Habeas Corpus, 550, in Pennsylvania, it was held, "that a parent might relinquish the right of custody of his child by parol. Where a father gave the care of his infant daughter to a sister of its deceased mother, and afterward only visited it about once a year, and never contributed to its support, and after a lapse of eight years, claimed custody of the child, such facts were held to establish the abandonment of the father's right." See, also, *Waldren*, 13 Johns. 418. See *U. S. v. Green*, 3 Mason, 482; *Mercein v. The People*, 25 Wend. 101; *Gishweiler v. Dodez*, 4 Ohio St. 615; *Ex parte Peter M. Shumput*, 6 Rich. 344.

An English case, *Lyons v. Blenkin*, Jacobs, 245, is in harmony with the American decisions. Lyons, first by *habeas corpus*, and finally by petition in chancery, sought to recover the custody of his three minor children from defendant, who was the husband of their aunt. The father, verbally and by act, had transferred his three minor children to the custody and care of their maternal grandmother, who accepted the custody and charge. By her will she provided an estate for them and her own daughter, Mrs. Blenkin, and appointed by her will her daughter as guardian of the minor grandchildren, and custodian of their persons and the estate devised to them by the testatrix. The aunt took charge of the minors, cared for, and educated them for several years, when, on account of differences between the father and aunt, he commenced proceedings to recover the custody of his children and their fortunes.

After a patient and full investigation, the lord chancellor says, p. 262: "It is always a delicate thing for a court to interfere against parental authority, yet we know that the courts do it in cases where the parent is capriciously interfering in what is clearly for their benefit." After remarking upon the fact that the father had voluntarily placed his children in the custody of their grandmother, and acquiesced in the possession of the aunt after it was transferred to her by the will of the grandmother; that they had formed habits, associations and attachments under her roof and supervision, he further says on p. 264: "I have not, in my judgment, a case before me that can justify me in removing these children from the custody in which they are, or from the course of education in which they have been placed and have hitherto gone

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on.” The custody of the aunt thus acquired was held to be superior to the right of the father.

After a thorough review of this question, Mr. Hurd, in his valuable work on Habeas Corpus, says, p. 537 : “Why then may he (the father) not transfer to another person the right of custody, where he may thus abandon or forfeit, especially where the interests of the child are not prejudiced by the arrangement? And how can the court pronounce that custody which is held under a fair agreement with the parent, and not injurious to the welfare of the child, to be an illegal restraint?” It is lawful custody until set aside by superior recognized legal right. See also Tyler on Infancy, etc., 284.

The statute defining and punishing child stealing, S. & C. 457, provides: “That every person who shall maliciously, or forcibly, or fraudulently, lead, take, or carry away, or decoy, or entice away any child under the age of ten years, with intent unlawfully to detain or conceal such child from its parent or parents, or guardian, *or other person having the lawful charge of such child*, shall, upon conviction thereof, be imprisoned in the penitentiary, and kept at hard labor, not more than seven years and not less than one year.”

The legal effect of the facts alleged in the petition, and admitted to be true for the purposes of the demurrer, brings plaintiff's possession of the minor children named in the petition within the scope and meaning of the statute making child stealing a felony. Plaintiff had the lawful charge of the children, and the spirit of this statute would rather aid than disturb the common-law right of action for damages for their wrongful abduction. Plaintiff, occupying, by contract, founded upon sufficient consideration, the protecting relation of the parents toward the minors, was vested with legal capacity to institute and maintain, in his own name, an action for damages against one who wrongfully and forcibly takes them from his care.

From authority and reason, the following propositions may be stated generally :

1. As a general rule the parents are entitled to the custody of their minor children. When the parents are living apart, the father is, *prima facie*, entitled to that custody, and where he is a suitable person, able and willing to support and care for them, his right is paramount to that of all other persons, except that of the mother in cases where the infant child is of such tender years as to

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require her present care ; but in all cases of controverted right to custody, the welfare of the minor is first to be considered.

2. The father's right is not, however, absolute under all circumstances. He may relinquish it by contract; forfeit it by abandonment; lose it by being in a condition of total inability to afford his minor children necessary care and support.

3. Where a father and mother, living apart, by agreement transfer the care and custody of their infant children to the grandfather of the children, in consideration that he will receive, care and provide for them, and in pursuance of such agreement he does take them in charge, the custody of the grandfather is lawful, and he has legal capacity to maintain an action for damages against one who wrongfully takes, or causes them to be taken, from his custody.

[Omitting the second question.]

III. At common law, a parent has an action for the seduction of his child, to whose services he is entitled. Analogous to the injury occasioned by seduction is that of the abduction of a minor child from its father, or one having it in lawful charge. To recognize the doctrine that one standing *in loco parentis*, clothed with the lawful custody of an infant under five years old, has no legal capacity to sue or maintain an action for damages, either general or special, against the child thief, would be an unwarranted restriction upon the common-law rights of the citizen. It would be no less restrictive to hold that no action can be maintained for such cause, by reason of the fact that the infant, because of its tender years, is unable to render any valuable services. The action rests upon the right to service, and not upon actual services.

Plaintiff, in substance, charges that these minor children were wrongfully taken from his possession, by defendants, to deprive him of their "possession and services." He avers he was at a large expenditure of time and money in recovering possession of them; that the infants, while in the custody of defendants, were "neglected, abused and ill-treated, so that they became feeble and sick," requiring great care, extra nursing, etc., to restore them to their customary health, and that this extra burden was occasioned to him by the wrongful acts of the defendants.

We are not at liberty, in view of the admitted facts, to presume, as suggested by counsel for defendants, that defendants acted at the instance of the father of the infants. If he was consenting to the stealing of them, as now advised, the court, looking to the interests

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of the minors, and the legal rights of plaintiff, would assert its power to protect the grandfather against the tortious acts of the father as well as those of strangers. The custody of the grandfather was legal, and one who would interrupt that relation should do so through the courts. If the father, he should have entered through the strait gate of the law to obtain possession of his children, and not have attempted to climb over it in some other and wrongful way. *Jones v. Cleghorn*, 54 Ga. 15.

On demurrer, an averment that the wrongful act complained of was done to deprive plaintiff of the services of the minors, without averring their ability to serve him, or the nature of the services of which he was deprived, is sufficient on the question of *per quod servitium amisit*.

Plaintiff, *in loco parentis*, in asserting his lawful custody to the infants, against one who has unlawfully taken them from his possession, can recover, as compensatory damages, the expenses necessarily incurred by him in reclaiming, and in nursing them through any sickness occasioned by the wrongful act of defendants, or that was occasioned through their agency. *Dennis v. Clark*, 2 Cush. 347; *Moritz v. Garnhart*, 7 Watts, 302; *Kirkpatrick v. Lockhart*, 2 Brev. 276; *Martin v. Payne*, 9 Johns. 387; 6 Am. Dec. 288; *Hewitt v. Prine*, 21 Wend. 78; 2 Add. on Torts, 1094.

The right to the custody of the infants, and their services as an incident thereto, is the gravamen of the action. Actual loss of services is not an essential allegation to enable plaintiff to maintain his action.

But whether damages, other than compensatory, may be recovered, we do not say, for the reason that such question is not necessarily before us now for determination.

Judgment reversed and cause remanded.

 RAILWAY CO. V. VALLELEY.

(32 Ohio St. 345.)

Carrier — of passengers — expulsion of drunken passenger from train — duty in regard to.

It is not only the right of a conductor to expel from a train a drunken, unruly, boisterous passenger, but when such a person endangers by his acts the lives of people, it is the duty of such conductor to remove such passenger

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in order to protect others from violence and danger. But this right must be reasonably exercised, and not so as to inflict wanton or unnecessary injury upon the offending passenger, nor so as to needlessly place him in circumstances of unusual peril. If having exercised reasonable prudence, considering the time, place and circumstances, as also the condition of the drunken man himself, the conductor expels such passenger, who is afterward run over and killed by another train not in fault, the expulsion itself is not such proximate cause of the death as will make the company liable.*

ACTION of damages for, causing death of plaintiff's intestate. The opinion states the facts. The plaintiff had judgment below.

J. T. Brooks, for plaintiff in error.

S. Meyer & Son, for defendant in error. The right which may be justly claimed in such cases differs in nothing from the right of self-defense, which may be exercised in the defense of one's person when wrongfully assaulted, or in the defense of the persons of those occupying certain relations to one, or in the defense of one's property. In exercising this right of self-defense, "the law justifies no more or greater force in defense of one's person, relative or property than is necessary, in the exercise of a reasonable and proper judgment, to prevent the consummation of the injury." 1 Huliard on Torts, 188, § 14; *Scribner v. Beach*, 4 Den. 448; *Bartlett v. Churchill*, 24 Vt. 218; *Dole v. Erskine*, 35 N. H. 503; *Philbrick v. Foster*, 4 Ind. 442; *Gaither v. Blowers*, 11 Md. 536; *Gallagher v. State*, 3 Minn. 270; *Hill v. Rogers*, 2 Clarke, 67; Bish. on Crim. Law, § 842; *Isbell v. Railroad*, 27 Conn. 393; 2 Redf. Rail. Cas. 474; *Kerwhacker v. Railroad*, 3 Ohio St. 173; 1 Hill. on Torts, 110; *Van Pelt v. McGraw*, 4 Comst. 110; *First Baptist Church v. Schenectady & T. R. R. Co.*, 5 Barb. 79; *Meyer v. Railroad*, 40 Mo. 151; *Robinson v. Pioche*, 5 Cal. 460; *Liddy v. St. Louis Railroad Co.*, 40 Mo. 511. See, also, *O'Keefe v. The Chicago, etc., Railroad Co.*, 32 Iowa, 468; *Sweeny v. Old Colony, etc., R. R. Co.*, 10 Allen, 369; *Davis v. Mann*, 10 M. & W. 546; *Sills v. Brown*, 9 C. & P. 601; *Rigby v. Hewitt*, 5 Exch. 239. See, also, Field on Damages, § 178; 2 Redf. Railw. Law, 192, § 177, and note 2; 2 Redf. Railw. Cas. 500-502; *Willetts v. Buffalo, etc., R. Co.*, 14 Barb. 585; *C., C. & C. R. Co. v. Terry*, 8 Ohio St. 570; *Robinson v. Cons.*

* See *Phila., etc., R. R. Co. v. Larkin* (47 Md. 155), 28 Am. Rep. 442.

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22 Vt. 213; *Philadelphia, etc., v. Spearen*, 47 Penn. St. 300; *Lygo v. Newbold*, 9 Exch. 302; *Waite v. North, etc.*, El. Bl. & El. 719; *Daley v. Norwich, etc.*, 26 Conn. 591; *Rauch v. Lloyd*, 31 Penn. St. 358; *Holly v. Boston, etc.*, 8 Gray, 123; *Lehman v. Brooklyn*, 29 Barb. 236; 2 Redf. Railw. Cas. 501, and note to the case; also *Railroad Co. v. Gladmon*, 15 Wall. 401; *Railroad Co. v. Stout*, 17 id. 657; Redf. on Com. Car., §§ 257-359, 365.

ASHBURN, J. We reverse the judgment of the court below, on the ground that the verdict was not sustained by the evidence, and should have been set aside upon the motion for a new trial.

Defendant in error, Mary Valleley, administratrix, brought suit against the railroad company to recover for the death of her brother, John Valleley, killed by the cars, as is supposed. Deceased was unmarried, and left a mother and sisters, for whose benefit this suit was brought. On the 6th September, 1870, John Valleley took passage in cars of the defendant, at Alliance, to go to Canton. He was a young man, less than twenty-one years of age. Before he took the train, and during the afternoon, he had been drinking considerably. He went into a saloon at Alliance and called for a drink. The saloon-keeper refused to give him any, saying that he had drunk enough. In the saloon William Reynolds and Dr. Smith were sitting, and deceased insisted on having a fight with one or both of them, not for any assignable cause or provocation, save that quarrelsome disposition which liquor sometimes infuses.

Dr. Smith was a stranger, but Valleley wanted to whip him, and the doctor describes the man as being "not very drunk, but ugly, fighting drunk."

At Alliance he hired a horse and buggy, and took a drive. Upon coming back to the livery-stable the owner claimed that the horse had been driven too hard, and that the consequences might be serious. Upon this Valleley, in his slang phrase, wanted to "lick him."

He took the cars about dusk. On the train he created serious disturbance. A witness describes him as on the platform between the cars, and swinging himself off, holding on to the iron railing, and out beyond the line of the train, in such a position that striking any object would probably have killed him. A brakeman interfered, and tried to pull him back to a place of safety. This occurred more than once, and there was a violent struggle between

the brakeman and deceased, in the course of which they got inside the car. They struggled together over the seats. There was a scene of great confusion. Ladies endeavored to get away by climbing over the backs of the seats. The passengers interfered and separated the combatants, and told the brakeman to go outside the car, as deceased appeared to have a violent antipathy against him. The brakeman complied, but coming back to get his hat deceased jumped at him again. They clinched and went down upon a seat, where were a lady and child, and, as a passenger states it, "I thought they would mash the child." Deceased was said to have been brandishing a knife, which he dropped upon the floor, and was hunting about to find. Passengers again interfered, and got the brakeman out upon the platform once more, shut and locked the door. Deceased tried to open it, and failing began an assault upon one of the passengers.

The conductor came along about this time and the passengers were clamorous to have the rowdy put off. The conductor stepped up to him, and deceased threatened to shoot him. The train, however, was stopped, and the man expelled. No harm was done him in this. No violence was used, and only force enough to accomplish the end.

Deceased was put off about eight or nine o'clock in the evening, the next morning he was found, about one-third of a mile from where he was put off, nearly dead, and in fact lived but a few moments after he was picked up. Though there is no direct testimony as to how he was killed, yet as he was found near the track, badly bruised and mangled, it is assumed that he was run over and killed by another of the company's trains; and for the purposes of this decision, that assumption may be regarded as the correct one.

Upon the first trial, the claim was that deceased was but slightly intoxicated, and so slightly that the company had no right to put him off. Upon this, the jury found for defendant. Whereupon the petition was amended, and the case tried upon the theory that deceased was so much intoxicated that the company had no right to expel him; that he was so very drunk as to be stupid, helpless, and unable to take care of himself; and putting him off near the track, where he was likely to be run over, and was run over, the company was responsible, and upon this a verdict of \$600 was recovered.

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It might, perhaps, as far as this case is concerned, be conceded that if a man were so intoxicated as to be without reason, sense, or intelligence, it would be unlawful, as it would be inhuman, to expel him from cars at night, where he would be just as likely as not to lie down upon the rails and go to sleep. We may concede further, that to put off a drunken man, during a bitterly cold night, in the woods, far from any house, when the probabilities were that he would freeze to death before help could reach him, would be as indefensible in law as it would be wicked and cruel in fact. And further, to put a man off, in a dark night, upon a high railroad bridge, or upon the brink of a precipice, where the first step would be destruction — this could find no justification in law. All this might possibly be. We suppose that the principles governing cases of this kind are not different from those which control the ordinary affairs of mankind. Rights and powers must be reasonably exercised, under all circumstances of the case. The conductor of a railroad train must use his best judgment and discretion. If he acts, not wantonly, not abusively, but with that prudence which the case demands, his employer cannot be made responsible.

It is claimed that this man was so drunk as to be bereft of all intelligence, and that the conductor ought to have known that putting him off was equivalent to putting him to death ; that such was his condition, that expelling him, as was done, nothing was more likely than that he would wander along the track, and be killed, as he was, and therefore the death was the natural and proximate result of the expulsion. The flaw in this claim is, that it is not true that deceased was so drunk as to be bereft of intelligence. He was ugly, "fighting drunk," vicious, and illustrating the qualities of a reckless desperado, but he had quite sense enough to take care of himself. That there was no paralysis of his physical faculties is evident from the manner in which he handled the brakeman ; and although all the witnesses recognized the fact of his intoxication, not one of them supposed that he was unable to take care of himself. Those who speak of it all say the reverse.

The man, therefore, was not helpless, nor stupid, and the conductor had no reason to think so. That it was not only his right, but his duty, under these circumstances, to put off a man furiously drunk, who, in a crowded car, with women and children, is fighting, flourishing a knife, and threatening to shoot, is evident upon the plainest principles of self-defense, if nothing else.

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But if the propriety of the expulsion were doubtful, either because deceased's conduct did not justify it, or because his condition rendered it unsafe and dangerous in its consequences, still we must find that the death was the natural and proximate cause of the expulsion before defendants can be made liable. How can this be said in the present case? Admit that the vicinity of a railroad track is dangerous to passers by; admit that putting him off, as was done, was placing him in circumstances of danger; they were no more dangerous to him than they were to every man whose business or pleasure takes him in the neighborhood of railroads. There was no unusual or extraordinary circumstance of danger in the whole transaction, if the man was able to take care of himself, and this he was. The mere putting him off, therefore, was in no way connected with his death, except as he himself connected it, by reason of his intoxication, and for this he alone is responsible. The expulsion is not in any way the occasion of the catastrophe, either as a proximate or other cause, unless it is in some way attached to or linked with the drunkenness. If this is the state of the case, he must have been so drunk at the time he was struck as to be unable to avoid the accident, which shows the intoxication to have been the proximate cause; and whether it be the proximate cause, or a cause for which alone he is responsible, in either case the responsibility cannot be fastened upon the defendant.

At what particular hour of the night or following morning he was run over, the evidence leaves in doubt. It has been said, and it is clearly shown by the record, that when he was so expelled he was not so drunk as to be in any sense incapable. What occurred between this time and when he was picked up in a dying condition cannot be known. If, during this period, he lapsed into insensibility or incapacity for self-protection, it must be from some reason not apparent in the testimony. Whether he obtained more liquor, or whether a drunken stupor came upon him, such as arises in the last stages of inebriety, no one can tell. It is sufficient to say that, in our opinion, he was not in that condition that relieved the conductor from the imperative necessity of doing as he did, and this we cannot consider as in any way being the cause of his death. *O'Keefe, Adm'r, v. C., R. I. & P. R. R.*, 32 Iowa, 457; *Haley, Adm'r, v. C. & N. W. R. R.*, 21 id. 15; *Vinton v. Middlesex R. R.*, 11 Allen, 304.

Judgment reversed.

SCOTT, J., being absent, did not sit in the case.

Peterson v. Roach.

PETERSON V. ROACH.

(22 Ohio St. 374.)

Partnership — money borrowed by one partner and used by partnership — when not partnership debt.

Where a partner borrows money on the credit of his individual note, which is signed also by a surety, such borrowing does not create a partnership debt, though the money be applied to partnership purposes; and the principal of such surety is the individual partner, with whom he joins in the execution of the note, and not the partners generally.

ACTION by surety to recover moneys paid for principal. The opinion states the facts. The defendant had judgment below.

Henry Newbegin, for plaintiff in error, cited *Purviance v. Sutherland*, 2 Ohio St. 478; *Horsey v. Heath*, 5 Ohio, 354; *St. Aubyn v. Smart*, L. R., 5 Eq. 182; *Blair v. Bromley*, 5 Hare, 542; s. c. on appeal, 2 Ph. 354; *Sprague v. Ainsworth*, 40 Vt. 47; *Smith v. Turner*, 9 Bush, 417; *Smith v. Jameson*, 5 T. R. 601.

H. H. Dodge, *J. R. Tyler*, and *James Murray*, for defendant in error.

SCOTT, J. The sole question in this case is as to the sufficiency of the facts stated in the petition of the plaintiff in the court below, to constitute a cause of action. Was the demurrer to it properly sustained?

The action was brought against the defendants, *McCreath & Roach*, as partners, to recover a sum of money alleged to have been paid by the plaintiff as surety for the firm. This payment is alleged to have been made in satisfaction of a judgment recovered against him, and *McCreath* alone, upon two promissory notes executed by *McCreath* individually, and by the plaintiff as surety, for money borrowed by *McCreath* of one *Toberin*, for the use of the firm. There is no averment in the petition that the money borrowed of *Toberin* was loaned by him to the firm of *McCreath & Roach*. On the contrary, the averment is that the money was loaned to the defendant, *William McCreath*.

It is not alleged that said firm was doing business under the firm name of *William McCreath*, or that the notes given for its repay-

ment were executed in the firm name. On the contrary, it is averred that "said defendant, William McCreath, signed said notes *in his individual name*." A recovery is not sought against Roach as a dormant or secret partner, who permitted the firm business to be carried on in the sole name of McCreath, while he kept his own connection therewith concealed from the world. So far as appears from the petition, the partnership was open, public and notorious. And it is not averred that the plaintiff became surety on the notes at the request of the firm, or of Roach, but simply at the request of McCreath.

It is however averred that the money, to secure the repayment of which the notes were given, was loaned to McCreath on account of and for the use of the partnership, and was in fact used in the business of the partnership, and that the plaintiff signed said notes at the request of McCreath, *as surety for the said partners*, and not for said McCreath individually, and in signing the same understood that he was becoming, and in fact did become, surety for said partners jointly, and not for said McCreath as an individual.

In so far as these averments may be understood as importing that the loan was made to the firm, or on its credit, and that the plaintiff became surety for the firm, we think they must be regarded as conclusions of law, drawn by the pleader from the facts stated; that is, from the facts that the money was borrowed for the use of the firm, and was in fact applied to and used in its business transactions. A demurrer does not admit the truth of such conclusions. If they are to be regarded as allegations of fact, they are inconsistent with, and are negatived by the other averments of the petition; for the notes themselves (copies of which are appended to the petition), in connection with the averments of the petition, evidence a transaction and contract to which the firm was not a party. They show that the moneys were loaned on the credit of notes executed by a single member of the firm, in his individual name, and by the plaintiff as his surety. They show that if the plaintiff signed the notes as a surety, his sole principal was William McCreath. In the absence of any allegation of fraud or mistake, the plaintiff cannot be permitted, by averment, to contradict the plain terms of his own written contract. The notes must speak for themselves, and they purport to be made by, and in behalf of, William McCreath and the plaintiff only.

The questions raised by the demurrer to this petition are, then,

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as we think, substantially these: Where a partner, on the security of a note signed by him individually and by another as his surety, borrows money for the use of the partnership, and which is, in fact, applied to partnership purposes, does the money so borrowed become a partnership debt? And if payment of the note be enforced against such surety, does he thereby acquire a right of action against all the partners, as his principals? Both upon principle and authority we think these questions must be answered in the negative. "Where one partner borrows money on his individual credit, and afterward applies it to the payment of partnership debts, or loans it to the firm, it does not entitle the original lender to consider himself a creditor of the firm, and to enforce payment against them." *Jaques v. Marquand*, 6 Cow. 497 (per SUTHERLAND, J., citing *Ex parte Hunter*, 1 Atk. 223; *Parkin v. Caruthers*, 3 Esp. 250). The plaintiff here became surety for an individual member of a firm, on an express separate contract made between him and Toberin. If the money borrowed was subsequently applied by McCreath to the use of the partnership, he, and not Toberin, thereby became the creditor of the firm. For moneys procured by McCreath on his individual credit, and used for the partnership benefit, there can be no doubt that he would be entitled to a credit in his account with the firm, and it would seem unreasonable that the other partner should, besides, be liable to the lender, on a contract to which he was not even an ostensible party, and of which he may have had no knowledge.

In *Bevan v. Lewis*, 2 Eng. Ch. 376, it was held that if a partner borrows a sum of money and gives his own security only for it, it does not become a partnership debt by being applied to partnership purposes, with the knowledge of the other partner.

The same was held in *Willis v. Hill*, 2 Dev. & Bat. 231. So, in a recent case in New York, it was held by the Court of Appeals that "where money is loaned upon the promissory note of one member of a copartnership, and upon his individual credit, the fact that the money was applied to the payment of the partnership debts does not constitute the lender a creditor of the firm. It is only in cases where the name used, and to which credit is given, is that adopted by the firm, and used to designate the partnership, that it is held liable." *Nat. Bank of Salem v. Thomas*, 47 N. Y. 15. See, also, *Emly v. Lye*, 15 East, 7. Such, we think, is the well-settled rule where the question arises between the lender and the partnership.

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And it cannot be otherwise where the surety of the borrower is the plaintiff. His principal can only be one who is liable for the debt. And unless such liability attaches to the partnership, he cannot claim that the relation of principal and surety subsists between the partners and himself.

We are, therefore, of opinion that the Court of Common Pleas did not err in sustaining the demurrer to the petition of the plaintiff below, and that its judgment was properly affirmed by the District Court.

Judgment of District Court affirmed.

RICE V. RAILROAD CO.

(33 Ohio St. 380.)

Marriage — married woman's charge of separate property — when implied.

When a married woman subscribes to capital stock of a railroad corporation, by which she agrees to take and pay for a certain number of shares of said stock, but makes default in payment, and action is brought to charge her separate property with the amount of such subscription, *held*, that in the absence of any proof that either party dealt on the credit of such property, equity will not imply or enforce a charge against the same.

ACTION to charge the separate estate of a married woman. The opinion states the facts. The plaintiff had judgment below.

John M. Lemmon, for plaintiff in error.

John McCauley, for defendant in error, cited *Phillips v. Graves*, 20 Ohio St. 371, and *Levi v. Earl*, 30 id. 147.

JOHNSON, C. J. The question for review arises upon the overruling of the motion for a new trial. It is assigned for error that the courts below erred in holding that upon the facts disclosed upon the trial, the real estate of Mrs. Rice was chargeable with the payment of her subscription to the capital stock of the railroad company.

It is conceded that her agreement was void at common law. For the purpose of charging the separate estate, it is alleged that this subscription for stock was made for the benefit of the wife and

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that of her separate estate, and to induce the railroad company to construct its road near the village of Woodville, near which her lands were situated, and thereby to enhance their value, and that when she made the agreement it was understood and agreed between the parties, that it was upon the faith and credit of her said estate, and also that she intended to and did charge the same with the payment thereof. These material averments are put in issue by the answer of Mrs. Rice, and, as all the evidence is now before us, the question now is, did the Court of Common Pleas and District Courts err in charging the property of Mrs. Rice with the payment of this obligation. There is no conflict in the evidence upon this issue.

From the bill of exceptions it appears :

1. That the tract of land upon which the court below charged this debt was purchased with the joint means of both husband and wife, and by agreement between them the title was taken in the name of the wife.

2. That in 1869, Mrs. Rice, at the request of a Mr. Burns and others, not agents of the railroad company, but who seemed to be acting in behalf of the citizens of Woodville, who desired to bring their road by their village, made the foregoing subscription on the paper on which there were other subscribers, and delivered the paper to Mr. Burns, subject to certain conditions not necessary to be here stated.

3. That nearly two years afterward Mr. Burns delivered the subscription paper to the directors of the company who accepted it, and thereafter constructed the road according to the conditions of said agreement.

4. That nothing was said by Mrs. Rice, at any time, expressing or indicating an intention to charge her property with the payment for said stock, nor is there any proof, unless it can be implied from the mere act of making the subscription, that she was dealing on the faith or credit of said property, or intended to charge it.

5. Neither is it shown that the company, at the time they received and accepted these subscriptions, or when it built the road, knew that Mrs. Rice was married or single, or that she had any property to charge.

6. Neither does it appear that the company acted upon the credit of Mrs. Rice's property, either in accepting the subscription or in building the road ; nor is it shown that the construction of

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the road has inured to the benefit of her or her property in any other manner than it did to the public generally.

Upon this state of facts it is quite clear no case is made for the equitable relief sought. This is an executory agreement, which is void at common law. It does not fall within that class of contracts relating to her separate estate, which a married woman is authorized by the statute to make, "for labor and materials for improving, repairing and cultivating the same." S. & S. 391. No intention to charge the separate estate is expressed in the written contract sued on, nor is there oral proof of such intention otherwise expressed. Neither party acted on the faith and credit of the wife's property.

The only ground on which this judgment can be supported is to hold, that from the mere fact that Mrs. Rice signed this obligation to take and pay for stock, the court will imply an intention to charge her property, and then enforce that implied intention.

In support of this proposition counsel quote a detached point of the syllabus in *Phillips v. Graves*, 20 Ohio St. 371; s. c., 5 Am. Rep. 675, which says that "such intention to charge may be inferred from the fact that she executed a note or obligation for the indebtedness." In thus detaching this point from the context, its scope and meaning is misapprehended. That was an action to charge a married woman's separate estate, upon a note given by her for a piano, purchased by her for her own use and benefit, upon the credit of her separate estate, under an agreement made by her when she incurred the debt, that she so charged it with such payment. The court, without undertaking to say whether a court of equity in Ohio would, under any circumstances, charge the separate estate of a married woman with her *general engagements*, very cautiously say it will so charge the same with her debts, *at least to the extent the same may be incurred for the benefit of her separate estate, or for her own benefit upon the credit of her separate estate;*" and that in such case the intention to charge may be *implied* from the fact that she gave a note or other obligation for the indebtedness. This case is not, therefore, an authority for the doctrine that such implication arises in all cases where a married woman makes a contract which is void at law, but only in the special cases named.

Neither is there any conflict between *Phillips v. Graves* and the case of *Levi v. Earl*, 30 Ohio St. 147. The examination given to

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the authorities in the last case makes it unnecessary to repeat them here.

The conclusion there reached was that the jurisdiction of a court of equity over the contracts of married women, and its power to charge her separate estate for the payment of her obligations, does not depend on the contract, for that is void, nor on the ground that by incurring the obligation she thereby, and by way of appointment, charges her estate, but upon the broad principle that courts of equity will give relief against such estates where upon all the facts and circumstances equity and good conscience demand it.

In such cases the chancellor will not permit a married woman to commit a fraud on another, any more than he would if she were a *feme sole*.

It was further held in *Levi v. Earl* that something more than merely incurring the obligation which the law would create if she were single is necessary to affect the estate; that is, equity will not imply an intention to charge and enforce such implied intention, merely because she has incurred a void contract; and in order to bind such separate estate by a general engagement, it should appear that it was made by her with reference to and upon the faith and credit of that estate, under such circumstances as make it equitable that such charge should be enforced.

What will, in such cases, where the obligation is, as in this case, purely executory, constitute good ground for relief, where no direct benefit accrues to the *feme covert*, or to her property, must be determined as each case arises.

The case at bar is that of an executory contract to pay for stock in a railroad corporation. There is no intention expressed in the contract, nor proved orally, to charge the separate estate. Neither party dealt or acted upon its credit. It does not appear that either she or her estate has been benefited by the construction of the road, nor that her subscription induced or influenced the company to act otherwise than it would have acted if it had not been made.

Upon the facts and circumstances of this case, we are clear that there is no ground for the intervention of a court of equity.

Whether this tract of land, which was purchased with the joint means of husband and wife, and the title taken in her name, by agreement between them, is the wife's separate property; whether there is a difference as to this equitable power to charge the wife's lands, between the *legal estate* of the wife constituting her

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general property at common law, but made *separate* property by statute, and that class of property known in courts of equity, before the enactment of the statute, as the wife's separate estate; and whether it makes any difference whether the intention to charge is expressed in the contract or orally, where such intention cannot be implied, are questions mooted in argument, but as they are not necessary to a disposition of this case, they are not considered.

Judgment reversed.

FARRELL V. THE STATE.

(22 Ohio St. 456.)

Criminal law—selling intoxicating liquors supposing them not to be intoxicating.

A person indicted for selling intoxicating liquors, in violation of statute, may, on the trial, show that at the time he bought the article alleged in the indictment to be intoxicating liquor, it was represented to him to be free from alcoholic properties — that he bought it with the understanding and believing that it was not intoxicating liquor, and sold it with such understanding and belief. (*See note, p. 617.*)

CONVICTION of illegally selling intoxicating liquors. The opinion states the case.

N. L. Johnson and C. W. Johnson, for plaintiff.

Isaiah Pillars, attorney-general, for defendant.

ASHBURN, J. The question in this case arises upon the rejection of certain testimony which defendant below proposed to offer on the trial, and which related exclusively to the offense charged in the second count.

[Omitting an immaterial remark.]

The section of the statute charged to have been violated by defendant, in the second count, declares: "That it shall be unlawful for any person or persons, by agent or otherwise, to sell, in any quantity, intoxicating liquors, to be drank in, upon, or about the building or premises where sold, or to sell such intoxicating liquors, to be drank in any adjoining room, building or premises, or other place of public resort connected with said building." S. & C. 1131.

It is not unlawful to sell intoxicating liquors in this State. The

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sale becomes unlawful, only where sold with a purpose prohibited, or to prohibited classes of persons named in the statute. It is further provided that the giving away intoxicating liquors, or other shift or device to evade the provisions of the statute, shall be deemed and held to be unlawful selling. No shift or device is alleged or sought to be proved against defendant. The article sold is charged and claimed to be intoxicating liquor.

The evidence tends to show the article sold and alleged to be intoxicating liquor was called, in the trade, bitters, and was sold to defendant by that name. The accused interposed two defenses — *first*, that the bitters sold was free from alcoholic properties ; and, *second*, that if the bitters did, in fact, contain alcohol, and was intoxicating by reason thereof, he was wholly ignorant of such fact ; that he bought the bitters upon information and in the belief that the bitters was free from alcoholic properties, and sold it free from all intention of violating the statute.

If sustained by proof, either of these claimed defenses would constitute a valid defense to the charge set out in the second count. As to the second claimed defense, such ignorance of fact as would relieve the alleged transaction of all criminal purpose on the part of the accused is a defense. Testimony tending to prove the accused was ignorant of that fact or condition which constitutes the criminal element of the criminal charge is competent testimony.

In such case the maxim of the criminal law, *ignorantia facti excusat*, applies to his case. The excusing principle of this maxim applies with great force where the business is recognized as lawful, and a transaction, in its prosecution, only becomes criminal when it is carried on with a purpose to violate the law. To give this maxim practical effect in a proper case is but an assertion of natural justice, for the reason that to render an act criminal the intention with which it is done must be so — the will must concur with the act. To make a transaction criminal, there must be both will and act entering into the transaction. 1 Paine's C. C. 16, 21 ; 1 Conn. 502–505 ; 1 Bishop on Crim. Law, § 301.

Ignorance or mistake in fact, guarded by an honest purpose, will afford, at common law, a sufficient excuse for a supposed criminal act. Bishop says, in his work on Criminal Law, § 287 : “ The doctrine which requires the existence of evil intent lies at the foundation of public justice. There is only one criterion by which the guilt of men is to be tested. It is whether the mind is criminal.”

Sir William Blackstone, 4 Com. by Ken. 25, says : " Ignorance or mistake is another defect of the will, when a man intending to do a lawful act does that which is unlawful. For where the will and deed act separately, there is not that conjunction between them which is necessary to form a criminal act. But it must be an ignorance or mistake of fact, and not an error in point of law. As if a man intending to kill a thief or housebreaker in his own house, under circumstances which would justify that act, by mistake kills one of his own family, this is no criminal act." See, also, *The United States v. Pearce*, 2 McLean, 14.

On the trial, defendant, without objection, offered testimony tending to show the bitters was free from alcoholic properties; that its intoxicating quality, if any it had, was due to the presence of gentian or other property, and not to alcoholic stimulants; that tests had been applied to the bitters, by persons competent to determine the fact, to show that the presence of alcohol in the bitters was so small that it could not be detected except by distillation. The accused then offered to prove, as shown by the record, "that at the time he purchased the bitters he was informed they contained no intoxicating properties whatever; that they had been inspected by a United States government inspector, and pronounced such a compound as needed no government revenue stamp thereon; that he sold them in good faith, believing them to be free from all alcoholic stimulants, which offer the court refused, and to which refusal defendant excepted."

We are unable to see why the proposed testimony was not competent. The accused's intention at the time of the sale was involved in the issue. It was competent to show that, from the circumstances of the case, he was free from culpable purpose, and one of the circumstances tending to show freedom from guilty intention in the sale was the fact, if fact it proved to be, that he had bought the bitters under the information and belief that it was an article free from alcoholic properties; that he sold it honestly believing from information obtained at the time of the purchase that it was not an intoxicating liquor. We think the testimony would have tended to show good faith and want of guilty intention on the part of the accused.

When put upon his trial the law presumed him innocent, and that presumption was as clear and strong in his favor on the day he bought the bitters as when the jury was sworn.

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The rejected testimony might be of slight weight, yet, as it was competent, it was error to exclude it from the jury.

To warrant a conviction upon a criminal charge, the State must show the guilt of the accused upon the specific charge beyond a reasonable doubt. The proofs in criminal cases are sometimes so evenly poised between proof of actual guilt and an honest uncertainty in the minds of the jurors that a slight amount of testimony might serve to justify an acquittal of the accused.

The judgment of the Court of Common Pleas on the second count in the indictment is reversed and remanded for further proceedings. The judgment of that court on the third count is affirmed and remanded for execution of sentence.

SCOTT, J., dissented.

Judgment reversed.

NOTE BY THE REPORTER. — From a note in the *Central Law Journal* on Ignorance of Fact we extract the following:

"As to this defense the following propositions may be laid down: *First.* When to an offense knowledge of certain facts is essential, then ignorance of these facts is a defense. *Second.* When a statute makes an act indictable, irrespective of guilty knowledge, then ignorance of fact is no defense.

"Of this last proposition the following illustrations may be given: To an indictment for bigamy it is no defense that the defendant, a woman, honestly believed (within the limits of seven years from the time he was last heard from) that her husband was dead. *Com. v. Mash*, 7 Metc. 472; *Com. v. Elwell*, 2 id. 190. In England decisions to the contrary were given before the law was thoroughly considered, by single judges. *R. v. Turner*, 9 Cox's Crim. Cas. 145; *R. v. Horton*, 11 id. 670. But these decisions have now been summarily and finally overruled. *R. v. Gibbons*, 12 id. 337. An indictment has been sustained in Massachusetts against a man for marrying a woman who believed herself to be a widow, although eleven years had elapsed since she had last seen or heard from her husband, whom she had left. *Com. v. Thompson*, 6 Allen, 591; *Com. v. Thompson*, 11 id. 23. It has been further held that when a guilty party in a divorce suit marries again without leave of the court (this being legally essential) during the life of the other party, and afterward obtains such leave, an honest belief that the second marriage is or has become legal has no effect in making it so and in protecting the parties. *Thompson v. Thompson*, 114 Mass. 566.

"Numerous illustrations to the same effect may be drawn from prosecutions for violations of the laws making indictable the sale of liquors under certain conditions. It is no defense, for instance, to an indictment for keeping or selling adulterated or intoxicating liquors, that the defendant did not believe them to be intoxicating or adulterated. *R. v. Woodrow*, 15 M. & W. 404; *Com. v. Farren*, 9 Allen, 489; *Com. v. Nicols*, 10 id. 199; *Com. v. Smith*, 108 Mass. 444; *State v. Smith*, 10 R. I. 258; *People v. Zeiger*, 6 Park. Cr. 355. Thus, on an indictment for selling adulterated milk, the defendant is not protected by ignorance of the adulteration, or even by the belief that the milk was pure. *Com. v. Waite*, 11 Allen, 334; *State v. Smith*, 10 R. I. 258. And the same rule applies to indictments for selling intoxicating drinks. *Com. v. Brynton*, 2 Allen, 160; *Barnes v. State*, 19 Conn. 398. In several States selling liquors to minors is indictable by statute, and in such cases also arises the question whether the defendant knew that the vendee was a minor. Here again we have the rule before us applied, it having been repeatedly held that ignorance in this respect, coupled even with an honest belief that the vendee was of full age, is no defense. *United States v. Dodge*, 1 Deady, 186; *Com. v. Goodman*, 97 Mass. 117; *Com. v. Emmons*, 98 id. 6; *Conn. v. Lattinville*, 120 id. 386; *Com. v. Finnegan*, 124 id. 394; *Barnes v. State*, 19 Conn. 398; *McCutcheon v. People*, 69 Ill. 601; *Farmer v. People*, 77 id. 322; *State v. Hartfel*, 24 Wis. 60; *State v. Cain*, 9 W. Va. 572; *Ulrich v. Com.*, 6 Bush, 400; *State v.*

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Howe, 71 N. C. 518; *aliter* under Georgia and Indiana statutes; *Stern v. State*, 58 Ga. 239; S. C., 21 Am. Rep. 286; *Brown v. State*, 24 Ind. 113; *Farbach v. State*, id. 77; *Goetz v. State*, 41 id. 162. It is also no defense to an indictment for selling to persons of intemperate habits, that the defendant did not know that the vender was of intemperate habits. *State v. Heck*, 23 Minn. 549; *Farmer v. People*, 77 Ill. 322. Though it is otherwise when the statute makes the offense to be selling to persons of "known" intemperate habits, in which case knowledge is an ingredient of the prosecutor's case. *Smith v. State*, 55 Ala. 1; *Crabtree v. State*, 80 Ohio St. 382.

"Analogous cases have arisen under statutes making it indictable to abduct, seduce or violate girls under a specific age. Here, also, it is no defense that the defendant mistook the girl's age. *R. v. Booth*, 12 Cox's Crim. Cas. 231; *R. v. Olfert*, 10 id. 402; *R. v. Robins*, 1 C. & K. 456; *State v. Ruhl*, 8 Iowa, 447. This principle has been illustrated in a recent leading case on the subject in England. The defendant was convicted under 24 and 25 Vict. of unlawfully taking an unmarried girl under sixteen years out of her father's possession and against his will. It was proved by the defendant that he *bona fide* believed, and had reasonable ground for believing, that the girl at the time of the act was over sixteen. COCKBURN, Chief Justice; KELLY, Chief Baron; BRAMWELL, CLEASBY and AMPLETT, Barons; BLACKBURN, MELLOR, LUSH, GROVE, QUAIN, DENMAN, ARCHIBALD, FIELD and LINDLEY, Justices, held that the defense was of no avail, and that the conviction was right. The sole dissident was BRETT, J. *Queen v. Prince*, L. R., 2 C. C. 154. A similar ruling is to be found in Iowa. It has been held in that State that knowledge that a child is under ten years is not necessary to convict a defendant of the statutory offense of assaulting a child under ten years. *State v. Newton*, 44 Iowa, 45. And it has been held in Missouri that it is no defense to a suit for marrying minors that the defendant believed them to be of full age. *Beckham v. Nacke*, 56 Mo. 546.

"In other kinds of prosecutions under the statutes making acts indictable irrespective of intent, similar conclusions have been reached. Thus, it is no defense to an indictment for betting at a gaming house, that the defendant believed that the house was licensed. *Schuster v. State*, 48 Ala. 199. Nor to an indictment for selling a calf under the statutory age, that the defendant did not know that the calf was below the limit. *Com. v. Raymond*, 97 Mass. 567. Nor to an indictment for carrying an illegal number of passengers, that the defendant did not know that there was an excess. *State v. Balt. Steam. Co.*, 13 Md. 161, though see *Duncan v. State*, 7 Humph. 148. Nor to an indictment for selling naphtha, that the defendant did not know that the oil was naphtha. *Com. v. Wentworth*, 118 Mass. 441. Nor to an indictment for illegally usurping an office, that the defendant honestly believed that he was honestly elected to the office. *State v. Hallett*, 8 Ala. 159; *McGuire v. State*, 7 Humph. 54; *State v. Hart*, 6 Jones (N. C.), 389.

"With these rulings may be classed the well-known common-law principle that it is no defense to an indictment for a libel that the defendant was ignorant of the contents of the libel. *Curtis v. Mussey*, 6 Gray, 261; *People v. Wilson*, 64 Ill. 195."

The same doctrine was held in respect to the offense of adultery. *Fox v. State*, 3 Tex. Ct. App. 329; *ante*, 144.

The cases of *Commonwealth v. Wentworth*, 118 Mass. 441, and *Commonwealth v. Boynton*, 2 Allen, 160, were very similar to the principal case in facts. The former was a complaint for selling naphtha under an assumed name. The defendant contended that it had been combined with chemical agents so that it was no longer explosive. The court said: "We are of opinion that the court correctly ruled, that the question whether the defendant had knowledge that the article kept by him was naphtha was immaterial. The statute does not make a guilty knowledge of one of the ingredients of the offense. It is like the statutes against the sale of intoxicating liquors, or adulterated milk, and many other police regulations; it prohibits the acts of selling or keeping for sale naphtha, under any name, not because of their moral turpitude, or the criminal intent with which they are committed, but because they are dangerous to the public; as stated in *Hurigan v. Nowell*, 118 Mass. 470, which arose under section 2 of this statute, 'for the protection of the community, the law throws upon the vendor the responsibility and burden of keeping himself, at his peril, within the terms of the statute, in dealing with a kind of article the use of which has been found to be attended with great danger.' *Commonwealth v. Raymond*, 97 Mass. 567; *Commonwealth v. Emmons*, 28 id. 6; *Commonwealth v. Farren*, 9 Allen, 429; *Commonwealth v. Boynton*, 2 id. 160."

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In the latter case it was decided that "A person may be convicted of being a common seller of intoxicating liquor, although he did not know, or suppose the liquor sold by him to be intoxicating." The court said: "The court are of opinion that the sale of intoxicating liquors, in violation of the statute prohibition, is not one of those cases in which it is necessary to allege, or prove, that the person charged with the offense knew the illegal character of his act; or in which a want of such knowledge would avail him in defense. If the defendant purposely sold the liquor, which was, in fact, intoxicating, he was bound, at his peril, to ascertain the nature of the article which he sold. When the act is expressly prohibited, without reference to the intent or purpose, and the party committing it was under no obligation to act in the premises unless he knew that he could do so lawfully, if he violates the law, he incurs the penalty. The salutary rule that every man is conclusively presumed to know the law is sometimes productive of hardship in particular cases. And the hardship is no greater where the law imposes the duty to ascertain the fact. It could hardly be doubted that it would constitute no defense to an indictment for obstructing a highway, if the defendant could show that he mistook the boundaries of the way, and honestly supposed that he was placing the obstruction upon his own land."

In *Commonwealth v. Furren*, 9 Allen, 489, it was decided that, "A person may be convicted of selling adulterated milk, under stat. 1864, chap. 122, § 4, although he did not know it to be adulterated; and an averment in the indictment that he had such knowledge may be rejected as surplusage."

In *Commonwealth v. Raymond*, 97 Mass. 567, the court said: "The defendant is charged with an offense under the first clause of stat. 1866, chapter 253, by which it is made punishable to kill a calf less than four weeks old, 'for the purpose of sale.' It was not necessary to allege in the indictment that he knew the calf to be less than four weeks old. Under this clause, as under the laws against the sale of intoxicating liquor, or adulterated milk, and many other police, health, and revenue regulations, the defendant is bound to know the facts, and obey the law, at his peril. Such is the general rule, when acts which are not *mala in se* are made *mala prohibita* from motives of public policy, and not because of their moral turpitude, or the criminal intent with which they are committed."

In *Ulrich v. Carpenter*, 6 Bush, 400, it was held that, "It is as incumbent on the vendor of liquor to know that his customer labors under no disability as it is for him to know the law." The court said: "The law commands him not to sell liquor to minors, unless by the written consent, or request of the father of such minors, if living, or of their mother, or guardian, if the father be dead. It is as incumbent on the vendor of the liquor to know that his customer labors under no disability, as it is for him to know the law, and his ignorance of neither will excuse him. In the third volume of Greenleaf on Evidence, section 21, eighth edition, it is laid down by the author, that, 'Ignorance, or mistake of fact, may, in some cases, be admitted as an excuse, as when a man, intending to do a lawful act, does that which is unlawful. Thus, where one, being alarmed in the night, by the cry that thieves had broken into his house, and searching for them with his sword, in the dark, by mistake, killed an inmate of his house, he was held innocent. So, if the sheep of A. stray into the flock of B., who drives and shears them, supposing them to be his own, it is not larceny in B. This rule would seem to hold good in all cases where the act, if done knowingly, would be *malum in se*. But when the statute commands that an act be done, or omitted, without culpability, ignorance of the fact, or state of things contemplated by the statute, it seems, will not excuse its violation. Thus, for example, when the law enacts the forfeiture of a ship, having smuggled goods on board, and such goods are secreted on board by some of the crew, the owners and officers being alike innocently ignorant of the fact, yet the forfeiture is incurred, notwithstanding their ignorance. Such is also the case in regard to many other fiscal, police and other laws and regulations, for the mere violation of which, irrespective of motives, or knowledge of the party, certain penalties are enacted; for the law in these cases, seems to bind the party to know the facts, and to obey the law, at his peril."

In *Barnes v. State*, 19 Conn. 308, it was decided in a prosecution for selling spirituous liquors to a common drunkard, that, "To sustain such prosecution, it is not necessary to prove that the defendant *knew* that the person to whom the liquor was sold was a common drunkard." The court said: "So we think the county court was correct in holding, that knowledge of one's character, as a common drunkard, is not essential, to subject the offender to the penalty of the law. The language used is too

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clear and too positive to be mistaken ; nor can we mistake the evil aimed at by the legislature. * * Can the ravisher plead ignorance? A female under the age of twenty-one years, is seduced or is enticed away; is ignorance of her minority any defense? Or, if adultery is committed, can the adulterer plead his ignorance that the woman was married?"

In *State v. Hartell*, 24 Wis. 80, it was decided that "the sale of intoxicating liquors to a minor is an offense under section 1, chapter 128 Laws of 1867, though the vendor does not know that the purchaser is a minor." The court said: "The authorities cited by the assistant attorney-general seems to leave no doubt as to the disposition which ought to be made of this case. The words 'knowingly' or 'willfully,' or other words of equivalent import, are omitted from the statute, and the offense is made to consist solely in the fact of a sale of intoxicating liquors, or drinks to a minor. Laws of 1867, chapter 128, section 1. The authorities are to the effect that, where a statute commands that an act be done or omitted, which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact, or state of things contemplated by the statute, will not excuse its violation. 3 Greenl. Ev. § 21; *Barnes v. State*, 19 Conn. 398; *Com. v. Marsh*, 7 Metc. 472; *Com. v. Boynton*, 2 Allen, 160; *Com. v. Farren*, 9 id. 489; *Com. v. Watts*, 11 id. 204; *Com. v. Raymond*, 9 Mass. 567; *Com. v. Elwell*, 2 Metc. 190."

In *Queen v. Bishop*, 5 Q. B. D. 252, it was held that where one received a lunatic into her house, the same not being licensed, nor a registered asylum or hospital, she was liable to punishment under the statute forbidding any one so "to receive one or more lunatics," although she honestly and reasonably believed the person so received not to be a lunatic. The court said her belief was immaterial.

It seems therefore that the principal case is quite opposed to the weight of authority.

BAKER V. PENDERGAST.

(23 Ohio St. 494.)

Negligence — contributory — when not excused by the illegal nature of the producing cause.

A person about to cross a street of a city in which there is an ordinance against fast driving has a right to presume, in the absence of knowledge to the contrary, that others will respect and conform to such ordinance. But where he knows that others are driving along the street, at the place of crossing, at a forbidden rate of speed, and he has full means of seeing the rate at which they are driving, the existence of such ordinance will not authorize a presumption which is negatived by the evidence of his senses. If the attempt to cross the street, under the circumstances, would be negligence on his part, the fact of the existence of such city ordinance is not evidence tending to free him from culpability.*

ACTION to recover damages of the defendant for driving his horse and sleigh, along Euclid street, in the city of Cleveland, so negligently and carelessly as to strike and run over the defendant

* Compare *Correll v. B. C. R. & M. R. R. Co.* (38 Iowa, 120), 18 Am. Rep. 22.

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with the said horse and sleigh, thereby greatly injuring him. The opinion states the facts. The plaintiff had judgment below.

Darius Cadwell and Marvin, Hart & Squire, for plaintiff in error.

Henderson & Kline and S. J. Andrews, for defendant in error.

SCOTT, J. Did the Court of Common Pleas err in permitting the city ordinance, which prohibits the driving of horses at a rate of speed exceeding six miles an hour, to be offered in evidence by the plaintiff in that court? It was offered and permitted to go to the jury for one purpose only. That purpose was, that it might be considered by the jury in determining whether the plaintiff was guilty of such contributory negligence as would prevent a recovery. It was offered solely to relieve the plaintiff from the charge of negligence in attempting to cross the street in the manner he did at the time when the accident happened; and was admitted on the ground that the plaintiff, when about to cross, had a right to presume that the defendant would obey the ordinance, and regulate the speed of his horse accordingly; and that if such rate would not have put the plaintiff in danger of a collision, then he was not guilty of negligence in attempting to cross. In admitting the ordinance in evidence for such a purpose, under the circumstances disclosed by the previous testimony, we think the court erred.

The ordinance was the last evidence offered on the trial by the plaintiff. The evidence previously offered, including his own testimony, shows that the defendant and many other persons, at and immediately prior to the time of the accident, were sleigh-riding on the street with fast horses. They were exhibiting their speed, in utter disregard of the ordinance, and were converting the drive-way substantially into a race-course. This fact was well known to the plaintiff. He had been standing for a considerable time on the sidewalk, with many other spectators, enjoying the scene. He was familiar with fast horses—had owned some—and could judge pretty correctly of their rate of travel. The street was straight, and plaintiff could have a full view along it, both ways, for a long distance. The defendant was driving at the time at a rate of speed approximating to twenty miles an hour, and others nearly as fast. This was the condition of things when the plaintiff attempted to cross the drive-way, three rods in width. Other sleighs, moving

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with equal rapidity, were in close proximity to that of the defendant, and while the plaintiff was endeavoring in his passage to escape from the former he was struck by the latter. There was no evidence tending to show that the plaintiff was ignorant of what was thus passing before his eyes. Indeed, under the circumstances shown, such ignorance would itself have evidenced the most culpable negligence. The plaintiff, then, could have no right to act on the presumption of the existence of a state of facts which was negatived by the clear evidence of his senses. He was acting on a *known* and not a *supposed* state of facts, which, in the absence of any information to the contrary, the ordinance might have justified him in presuming. In view of this known state of facts, it was his duty to exercise reasonable care for his own safety. And from this duty he was in no degree relieved by the ordinance in question.

We are referred by counsel for defendant in error, in support of the ruling which permitted the ordinance to be offered in evidence, to the case of *Jetter v. N. Y. & H. R. Co.*, 2 Keyes, 154. In that case it was held by the New York Court of Appeals, that, "in the exercise of his lawful rights, every man has a right to act on the belief that every other person will perform his duty and obey the law; and it is not negligence to assume that he is not exposed to a danger which can only come to him through a disregard of law on the part of some other person."

The soundness of this doctrine, and its proper application, to that case, we are not disposed to question. That was an action brought to recover for injuries sustained by the plaintiff's daughter, six years of age, and partially deaf and dumb, who was run over and injured, whilst in charge of a servant, by one of the defendant's street cars. At the time of the accident she was crossing a street, and was running a little ahead of the woman attendant, and defendant claimed there was negligence on the part of the child and her attendant. The plaintiff gave evidence tending to show that at the time the servant and child started to cross the street there was no car in sight, and the street was free from vehicles; that defendant's car came rapidly round a curve or corner, with the horses on a run or jump, a short distance from where the child was crossing, and so suddenly that the child had not time to see and escape the danger, or the servant time to rescue her from it. The plaintiff also put in evidence the ordinance of the city forbidding cars from turning a corner faster than a walk, or to travel on a street faster

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than six miles an hour. The court instructed the jury that, "under such circumstances, a person about crossing a street, and having in charge a child of tender years, has a right to take into consideration the fact that, by the city ordinances, no vehicle is permitted to turn a corner faster than a walk, nor to travel on a street faster than six miles an hour; and if the jury should find that the woman and child could have crossed the street in time to avoid any collision, provided the defendant's car had been driven at no greater rate than the city ordinances permitted, then they must assume that it was not negligence in the woman to permit the child to let go of her hand for the moment and cross the street alone; while, on the contrary, if you should come to the conclusion, from the entire evidence of the case, that at the time when they attempted to cross *the car was in view*, then you are to consider whether the car was so near as to render the attempt unsafe, because, if it was unsafe, it follows that it was negligence to allow the child to leave the immediate protection of the woman, and the plaintiff cannot recover." This instruction was supported by the Court of Appeals. But it is obvious, in this case, that the jury was allowed to consider the existence of the city ordinance on the subject of fast driving only in the event of their finding that defendant's car was not in sight, and its illegal rate of speed was unknown to the woman and child when they left the sidewalk and undertook to cross the street.

But if at that time the car was in sight, and its rate of speed, however illegal, was apparent, it is clear that the court regarded the city ordinance as having no bearing on the question of contributory negligence. That case is, therefore, quite in harmony with the views we have expressed.

The erroneous admission of the ordinance in evidence might, possibly, not have been to the prejudice of the plaintiff in error, had the charge of the court been such as to give it no significance. But grave importance seems to have been attached to its effect in the charge. The jury was instructed, among other things, that "the ordinance might be evidence for the purpose for which it is claimed to be competent and legal evidence; that is to say, to relieve the plaintiff from any charge or imputation of negligence growing out of the act he did or attempted to do."

And, again: "Inasmuch as the ordinance was in existence, of which the plaintiff was presumed by law to have knowledge, he

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him what Weil had said, to which Boyd replied: 'I will come in this afternoon, and arrange it.' " And again he said, that "he told Boyd the new note was waiting at the bank to be indorsed, and that Boyd replied he would come in and attend to it. The note had been brought to the bank during bank hours of Saturday, and left there for Boyd's indorsement." Griffith further said, as to Boyd's statements: "He said he would come in and arrange it, or attend to it. He gave me to understand it would be all right. The amount of his statement was, he would come in in the afternoon and fix it, or arrange it, or do something. That is what I say now. I do not recollect the precise words, but the impression left on my mind was that he would come in and arrange it in the afternoon.

Wm. Laughlin testified that "Boyd spoke of his going out of town, and that he had told Weil to leave the note at the bank; that Boyd said he had told Weil that he was going out of town, and for him (Weil) to have the note at the bank, and he (Boyd) would call and fix it when he came back."

The note was not protested. The plaintiff had judgment.

Kent, Newton & Pugsley, for plaintiff in error.

Osborn & Swayne, for defendant in error.

WRIGHT, J. The only question we propose to consider is, did the words and deeds of Boyd amount to a waiver of notice of dishonor?

Parsons states the law on the subject thus: "Demand and notice may be waived by an act of the indorser, calculated to put the holder off his guard and prevent him from treating the note as he otherwise would have done." 1 Parsons on Notes and Bills, 582.

The same author also says, page 592: "It will be seen that the general principle upon which most of these cases on the subject of waiver depends is, that the indorser has, by act or word, done something calculated to mislead the holder, and induce him to forego taking the usual steps to charge the indorser. The same principle would apply, in our opinion, when the declarations are made on the day of maturity. Thus, where the holder asked the indorser, on the day the note matured, if it would be best to call upon the makers, and the indorser replied that it would be of no use, a regular demand and notice were deemed waived. So a verbal request by the indorser to the holder not to protest the note

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was held to be a waiver of demand. With reference to the question whether a particular conversation amounts to a waiver, no general rule can be laid down, except that the words used must be such as fairly to lead a reasonable man to suppose that the indorser did not wish that the regular course in making a demand and giving notice should be pursued, or such as would be calculated to prevent him from so doing. But on the other hand, the language must not be so vague, uncertain, or loose as to raise a reasonable doubt as to what was intended."

On this subject Edwards says, page 633 (Lich.): "And any conduct on the part of the (drawer or) indorser calculated to, and actually inducing the holder to omit serving him with (a) regular notice will have the same effect. Thus where it was proved that a few days before the bill became due the drawer called at the counting-house of the holder, and being asked the place of his residence, replied that he had no regular residence, that he was living among his friends, and would call and see if the bill was paid by the acceptor, this was held to dispense with notice, and threw upon the drawer the duty of inquiring whether the bill was met at maturity."

In *Lary v. Young*, 13 Ark. 402, the head-note reports: "A few days before it (the note) became due, the attorneys of the indorsee reminded the indorser it would soon be due and that the maker had left the place. The indorser replied that he owed the note, that it was all right, that he had indorsed to pay it when it became due; his agent, who had notes and accounts in his hands for collection, would do so. *Held*, sufficient waiver of demand and notice."

Daniels says: "Any act, course of conduct, or language of the drawer or indorser calculated to induce the holder not to make demand or protest, or give notice, or to put him off his guard, or any agreement by the parties to that effect, will dispense with the necessity of taking these steps." 2 Dan. Neg. Inst., § 1103, p. 130.

In *Gove v. Vining*, 7 Metc. 212, the syllabus is: "A promissory note was made payable at either bank, in Boston, in four months from December 27, 1841, and was indorsed by the payee. On the 27th of April, 1842, the holder sent a messenger, with a note and written notice to the indorser, requesting payment, to the house in which the maker and indorser resided. The maker was absent, but the indorser read the notice and told the messenger that the

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maker would see the holder in a short time, and wished him not to sue the note until the maker should see him. No demand was afterward made on the maker, nor notice given to the indorser. *Held*, that the indorser had waived a legal demand and notice, and was answerable to the holder." SHAW, J., in delivering the opinion, says: "And the court are of the opinion that when the indorser at, or shortly before the time when the note becomes due, says to the holder that an arrangement for its payment is about being made, and in direct terms, or by reasonable implication, requests the holder to wait and give time, it amounts to an assurance that the note will be paid, that the promisor or indorser will pay it, and is a waiver of demand and notice. It tends to put the holder off his guard, and induces him to forego making a demand at the proper time and place, and it would be contrary to good faith to set up such want of demand and notice, caused, perhaps, by such forbearance, as a ground of defense."

Counsel for plaintiff in error cite *Cayuga Bank v. Dill*, 5 Hill, 403, and it must be admitted that the case is much like the one before us, but decided adversely to the views here advanced. COWEN, J., dissented, and Daniels says of the case: "The court was divided, and the decision has been justly criticised and condemned." 2 Dan. Neg. Inst., § 1107. Parsons says: "The opinion of COWEN, J., is clearly the better." 1 Pars. Notes and Bills, 592, note *g*.

The question to be determined is whether, upon a fair construction of Boyd's conduct, it was calculated to mislead a reasonable person, to put him off his guard, and to induce him to forbear taking the necessary steps to charge the indorser. We think Weil fairly represented Boyd to the bank, and these representations were affirmed to be authentic on Monday, when Boyd, upon being told them by Griffith, answers that he will come and attend to it. This statement made to the bank, on Saturday, taken in connection with the leaving of the new note with the officers of the institution, fairly led them to believe that Boyd would do what he said. Had he kept his word, and indorsed the note on Monday, the necessity of notice and protest was waived.

One who leads another to act upon the faith of statements made cannot escape the consequences which a silence upon such statements has occasioned.

Judgment affirmed.

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Timber was cut from lands of B. by trespassers, who, by their labor, converted it into cord-wood and railroad ties, thus increasing its value three-fold. It was then sold to an innocent purchaser, who was sued by B. for the value of the wood and ties. Whatever might be the rule of damages as against innocent purchasers, B. cannot recover the value of the timber as enhanced by the labor of the wrong-doers, after it was severed from the realty.*

ACTION of trespass. The opinion sufficiently states the point. The plaintiff had judgment below.

J. Mason, Estep & Burke, and *W. J. Boardman*, for plaintiffs in error.

J. E. Ingersoll, for defendant in error, on the rule of damages, cited *Silbury v. McCoon*, 3 Comst. 379; *Brown v. Sax*, 7 Cow. 95; *Baker v. Wheeler*, 8 Wend. 505; *Salmon v. Horwitz*, 28 Eng. L. & Eq. 175; *Martin v. Porter*, 5 M. & W. 351.

WRIGHT, J. We have not deemed it necessary to solve all the nice and difficult questions that relate to the plaintiff's (Barbour's) title to this land. Whether or not they had the legal, they did also claim an equitable title, and there was some evidence to sustain the claim. This question of fact was left to the jury, who found upon it for plaintiffs below. We are not clear that this finding was so palpably against the weight of evidence as to justify interference by us. We therefore assume that plaintiffs had title sufficient to maintain the action in that respect, and proceed to the second point, the rule of damages.

The petition, it will be noticed, is not as for a trespass to real estate, but to recover the value of the wood and timber stolen; the action throughout was treated as one to recover that value, and the case is so treated here.

Upon the point now to be determined the case is thus: A large amount of wood was cut down upon plaintiff's land and stolen. The thieves work it up into cord-wood and ties, thus increasing its value three-fold. The depredators then sell it to the railroad com-

* To same effect: *Waters v. Stevenson* (13 Nev. 157), 29 Am. Rep. 298.

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pany, who is entirely innocent in the whole matter. The real owner now sues the railroad company for the property taken from his land. Shall he recover one dollar or three?

It is said upon the one hand to be a universal rule of law that a man's property cannot be taken from him without his consent, unless by law, and that stealing can convey no title to the thief. In *Silsbury v. McCoon*, 3 Comst. 381, it is said: "It is an elementary principle in the law of all civilized communities that no man can be deprived of his property except by his own voluntary act, or by operation of law. The thief who steals a chattel, or the trespasser who takes it by force, acquires no title by such wrongful taking." It is then argued that the thief, having none himself, could convey no title to any other person taking it, however innocently. Hence, when the railroad company obtained the property, they obtained what was the plaintiff's, and they could have replevied it, increased in value as it was by the labor of the thief. If this were so, then it is argued that the company were liable for the value of the wood in its improved condition, enhanced to the extent of three-fold.

If the owners were bringing this action against the thieves, perhaps it might be conceded that the full amount could be recovered. This we understand to be upon the principle "*in odium spoliatoris*." The thief will not be allowed to have any thing by virtue of his own wrong, and if he has spent his labor upon stolen goods he shall not profit by it. It is his own loss.

"The English law will not allow one man to gain a title to the property of another, upon the principle of accession, if he took the other's property willfully as a trespasser." 2 Kent, 363.

But it seems to be well understood that the rights of the parties are made to depend to a great extent upon the intent with which the conversion of property has been brought about. If it was taken *mala fide* by theft, or with a willful purpose to do wrong, the consequences are different from those which follow upon the act done under an honest mistake, and perhaps it is as wise to punish the robber as to protect the innocent.

In treating of confusion of goods, Blackstone speaks of the difference between cases where admixture is by consent of both parties, and where it is by the willful act of one, and in regard to the latter the author says: "Our law, to guard against fraud, gives the entire property, without any account, to him whose original

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dominion is invaded." In case of the confusion by consent it is otherwise, and each party retains his interest.

Mr. Cooley, in his note to page 404, book 2, recognizes the same distinction between a fraudulent purpose and an innocent mistake. The same distinction is made in 2 Kent, 363; Sedg. on Dam. 484.

Field on Damages, § 818, says: "There should certainly be a distinction between a case of mere technical conversion, when, perhaps, the defendant acts in good faith, and that of a willful conversion and wrong done by the defendant."

The cases as to what is the proper rule of damages, where property has been taken and by the taker improved in condition or enhanced in value, are numerous, but a reference to some will show some of the difficulties attending the subject.

In *Silbury v. McCoon*, the corn of one Wood had been manufactured into whisky by plaintiff. The defendants, as judgment creditors of Wood, took it, and plaintiff sued for the value of the whisky. The case is first reported 6 Hill, 425. Here it is decided that the change from corn to whisky was a change of identity, and transferred the property to plaintiffs, who were the manufacturers producing the change. This decision goes wholly upon the question of identity. There is a learned note to this case, which discusses the question of innocent and wrongful conversion, and the citations there given from Puffendorf, Justinian, and Wood's Institutes are apposite. This case is again reported in 4 Denio, 332. Here the idea that the rights of the parties depend upon motive or intention is flatly repudiated, the court holding that as long as the owner can trace his property, he may regain it; thus again making identity the criterion. The case is reversed in 3 Comst. 381, upon the ground that the *animus* with which the corn was converted was an important element, and that if plaintiffs, when they took it, knew that they had no right to it, they could obtain no title, although by the manufacture into whisky they had changed the identity.

The simple fact, therefore, that the property can be traced into its improved state is not always sufficient to insure a recovery of the improved article or its value.

It must be remarked, however, that the text-books do assert that the proposition of identity is the controlling one. Kent says: "It was a principle settled as early as the time of the Year Books, that whatever alteration of form any property had undergone, the owner might seize it in its new shape, and be entitled to it in its

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state of improvement, if he could prove the identity of the original materials ; as if leather be made into shoes, or cloth into a coat, or a tree be squared into timber." 2 Kent, 263 ; *Betts v. Lee*, 5 Johns. 348 ; 2 Bla. 404. It will, however, appear that other considerations enter into the solution of the question.

In *Hyde v. Cookson*, 21 Barb. 92, it is held that, "in acquiring title to property by accession, the law makes a distinction between a willful and an involuntary wrong-doer. The former can never acquire the title, however great the change wrought in the original article may be, while the latter may."

"Where a manufacturer has expended his money and labor, in good faith, upon property, in pursuance of a contract with the owner, he cannot be regarded as a wrong-doer, or deprived of the enhanced value which he has given to the property, in an action by the owner, sounding in damages."

It is said, in the course of the opinion, that the "distinction between a willful and an involuntary wrong-doer runs through the authorities, and stands upon the principle that a party can obtain no right by his own wrong." (Page 105.)

Martin v. Porter, 5 M. & W. 351, was a case where defendant, in working his coal mine, broke through the barrier, and took the coal under the land belonging to plaintiff. Plaintiff recovered the full value, without any deduction to defendant for his expenses in getting the coal. But in *Hilton v. Woods*, L. R., 4 Eq. 440, the rule in *Martin v. Porter* is limited to cases of fraudulent conduct. And such is the effect of the case of *Morgan v. Powell*, 3 Ad. & El. (Q. B.) 278 ; and in *Wood v. Morewood*, id. 441, PARKE, B., told the jury that "if there was fraud or negligence on the part of defendant, they might give, as damages under the count in trover, the value of the coals at the time they first became chattels, on the principle laid down in *Martin v. Porter* ; but if they thought the defendant not guilty of fraud or negligence, but acted fairly and honestly, in the full belief that he had the right to do what he did, they might give the fair value of the coals, as if the coal-fields had been purchased from the plaintiff."

In *Hilton v. Woods*, L. R., 4 Eq. 432, the head-note is: "In assessing compensation for coal already gotten by defendant, the court, being of opinion that he had worked it inadvertently, and not fraudulently, held that he was to pay only the fair value of such coal, as if he had purchased the mine from defendant."

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MALINS, V. C., says: "There is much difficulty as to the mode of assessing the compensation to an owner of coal which has been improperly worked by the owner of an adjoining mine. It is clear upon the authorities that a different principle is applicable when the coal is taken inadvertently, or as in the present case, under a *bona fide* belief of title, and when it is taken fraudulently, with a full knowledge on the part of the taker that he is doing wrong, or in other words, committing a robbery."

In these English cases, the right of plaintiff to recover the increased value of the coal -- that is, the value occasioned by the expense of mining, is made to depend on the *animus* of the party committing the trespass. If he stole, he loses his labor and money. If he made an honest mistake, he does not incur that loss, and the owner only recovers the value of the coal without its accession. There would seem to be a very short way out of these difficulties, if the question of identity was the only one. There was no trouble in the owner identifying his coal, but this does not entitle him to recover its value, increased by being mined, except in case of bad faith. It should be noted that *Jegon v. Vivian*, L. R., 6 Ch. App. 742, seems disposed to limit this rule of damages to cases at law, not applying it in equity. There are a number of coal cases in Pennsylvania. In *Forsyth v. Wells*, 41 Penn. St. 291, LOWRIE, C. J., after discussing the conflict in the cases, says: "We prefer the rule in *Wood v. Morewood*, where PARKER, B., decided in a case of trover for taking coals, that if the defendant acted fairly and honestly, in the full belief of his right, then the measure of damages is the fair value of the coals, as if the coal-fields had been purchased from the plaintiffs."

"Where the defendant's conduct, measured by the ordinary standard of morality and care, which is the standard of the law, is not chargeable with fraud, violence, or willful negligence, or wrong, the value of the property taken and converted is the just measure of compensation. If raw material has, after appropriation and without such using, been changed by manufacture into a new species of property, as grain into whisky, grapes into wine, fur into hats, hides into leather, or trees into lumber, the law either refuses the action of trover for the new article, or limits the recovery to the value of the original article.

"Where there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury done is the pur-

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pose of all remedies; and so long as we bear this in mind, we shall have but little difficulty in managing the forms of action, so as to secure a fair result. If the defendant in this case was guilty of no intentional wrong, he ought not to have been charged with the value of the coal, after he had been at the expense of mining it, but only with its value in *place*, and with such other damages to the land as its mining may have caused."

This case also holds that no change in the form of action can vary the rule of damages.

In *Herdic v. Young*, 55 Penn. St. 176, the defendant had been cutting timber on his own tract and by mistake cut some upon an adjoining tract of plaintiff. The trespass was not willful or wanton, but was in a *bona fide* belief of title. The logs had been driven to the boom, and plaintiff sought to recover their value at that place, which was of course enhanced by the labor and expense defendant had put upon them. But it was held that the rule of damages was the value of the timber in the stump when the trees were cut.

AGNEW, C. J., says: "If defendant denies that his trespass was willful or wanton, and claims a right to the additional value given to the chattel by his labor and money in converting and transporting it to the place where it is replevied, he has in his power to bring the damages of the plaintiff to their true standard. In a case of inadvertent trespass, or one done under a *bona fide*, but mistaken, belief of right, this would generally be the value of the logs at the boom, less the cost of cutting, hauling and driving to the boom. Such a standard of damages, growing out of the nature of the act and of the form of action, is reasonable, and does justice to both parties. It saves to the otherwise innocent defendant his labor and money, and gives to the owner the enhancement of the value of his property, growing out of other circumstances, such as a rise in the market price, a difference in price between localities, or other adventitious causes." *Coleman's Appeal*, 62 Penn. St. 252-278.

In the case of *Barton Coal Co. v. Walter Cox*, 39 Md. 1; s. c., 17 Am. Rep. 525, the question is much discussed and the authorities reviewed.

In *Heard v. James*, 49 Miss. 236, the rule of damages in case of conversion is said to be determined by the *animus* of the party trespassing. If the act was in good faith, upon some supposed

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right or claim, or error, the rule is the value of the property when taken ; but if the taking be characterized by malice or oppression, damages may be punitive, and in an action no allowance will be made the defendant for any increased value bestowed on the property by his skill and labor.

In this case trees had been cut down on the plaintiff's land and made into staves, and the question was whether plaintiff should recover as damages the value of the staves, or only of the trees as they stood on his ground. The plaintiff was allowed to recover the full value, allowing defendants nothing for their labor in working up the timber into staves, and upon the principle stated. The court says: "The conduct of defendant was willful, utterly regardless of the rights of the plaintiff."

That the intent of the defendant is material in regard to damages has always been recognized in our law. Upon this is founded the whole idea of exemplary damages. We know it has been strenuously urged in what has been called "the speculative notions of fanciful writers" (*McBride v. McLaughlin*, 5 Watts, 375 ; *Sedgw. on Meas. Dam.* 463), that punishment belongs only to the administration of criminal law, and has no proper place in that civil procedure which adjusts only the rights of parties ; but the principle is too firmly settled to be controverted now. *Pratt v. Pond*, 42 Conn. 318 ; *Walker v. Fuller*, 29 Ark. 448 ; *Grund v. Van Vleck*, 69 Ill. 478. And yet the rule should be carefully applied, as it may leave to courts and juries to determine the extent of punishment unrestricted by the well-defined limits of statutory enactment. Therefore it is that there are authorities holding that even in cases of willful trespass, if the trespasser has made a large increase in the value of the property by his labor, it will not be allowed that it shall all go to the original owner, because it is said to be unjust.

The fact that the trespasser is to lose the labor and expense he has put upon the property he has wrongfully taken results as a punishment to him for what he has done ; on this ground the original owner recovers the increased value, not because of any rights in him, but because the law gives this infliction, as a terror to offenders. Yet the punishment must be proportioned in some way to the circumstances of the case, and a proper inquiry is, in what manner and to what extent should the trespasser suffer, and conversely what should be the kind and measure of redress to the injured party ?

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BROWN, J., puts this case (*Silsbury v. McCoon*, 4 Den. 337) : A trespasser who takes iron ore and converts it into watch-springs, by which its value is increased a thousand fold, should not be hanged ; nor should he lose the whole of the new product. Either punishment would be too great. Nor should the owner of the ore have the watch-springs, for it would be more than a just measure of redress.

The Supreme Court of Wisconsin adopts the same idea. The case of *Single v. Schneider*, 30 Wis. 570, is a case where logs were willfully cut from the premises of another ; they say it is unnecessarily severe that defendant should lose the value of all their labor. S. c., 24 id. 299 ; *Weymouth v. C. & N. W. R. R.*, 17 id. 550 ; *Hungerford v. Redford*, 29 id. 345. An interesting discussion of the question of damages by Judge COOLEY is to be found in *Wetherbee v. Green*, 22 Mich. 311 ; s. c., 7 Am. Rep. 653, the syllabus of which is : "No test which satisfies the reason of the law can be applied in the adjustment of questions of title to chattels, by accession, unless it keeps in view the circumstances of relative values. The purpose of the law will not be gained by establishing arbitrary distinctions based upon physical reasons ; but its object must be to adjust the redress afforded to one party and the penalty inflicted on the other, as near as the circumstances will permit, to rules of substantial justice, if very great increase in value in the change of property from one form to another is of more importance in determining the rights of parties in it, than any inexpensive chemical change of mechanical transformation, however radical. And where timber of the value of \$25 had been, in the exercise of what was supposed to be proper authority, converted into hoops, of the value of \$700, the title to the property, in its converted form, passed to the party by whose labor, in good faith, the change had been wrought." In this case it was a conceded fact that the taking of the timber was in good faith, defendant supposing that he had a license so to do from the owner of the land. In this, however, it appears he was mistaken. Judge COOLEY discusses very fully the distinction between cases where property is taken innocently, and where it is taken dishonestly, and recognizes the proposition that the rule of damages is varied accordingly. He also discusses the rule already so frequently spoken of, that when the owner can trace the identity of his property, he may reclaim it however it may be increased in value. But this he seems to think an unsatisfactory

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test, the purpose of the law being to adjust the redress afforded to the one party, and the penalty inflicted upon the other, as near as the circumstances will permit, to the rules of substantial justice. If one had a stick of timber stolen, and could distinctly trace it into a house being newly built, the identification might be beyond peradventure, yet no one would claim that the owner of the stick could recover the whole house, either in ejectment or its value in damages. Or a particular piece of wood might be followed into an organ, but the owner of the wood could not replevy the organ. Where the right to the improved article is the point in issue, certainly the question should be considered, how much the property or labor of each has contributed to make it what it is, at least in those cases where no bad faith exists.

It cannot therefore be true, in every instance, that because a man can trace his property, he can always recover it, regardless of the circumstances under which it has come into the hands of the present holder, regardless of its improved condition, and regardless of the injury an absolute and unconditional recaption may occasion. The law, as Judge COOLEY says, endeavors to do what is right and just between the parties, and while it will seek to compensate the real owner, will not occasion outrage to one who has been innocent.

It may be that if these owners had found their wood in the hands of the trespassers, it might have been retaken, or its value as cord wood recovered ; but if so it would be upon the principle "*in odium spoliatoris* ;" the thief could gain nothing by his own wrong, and therefore the results of his labor go to the owner of the property. But this principle cannot apply where an innocent purchaser comes into the case, for the simple reason that he has done no wrong.

It is very true that the willful trespasser or thief can convey no title to one to whom he sells, however innocent the purchaser may be. But the question right here is, what does "title" in this connection mean? The original owner has the "title" to this timber, and *as against the thief*, the title to the results of the thief's labor. The wrong-doer, as it were, being estopped from setting up any claim by virtue of the wrong he has done. Against the innocent purchaser from the thief, the original owner still has the "title" to his timber, but by virtue of what does he now have "title" to the thief's labor? The estoppel, so to call it, being created by fraud or wrong, exists only against the one guilty of that

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fraud or wrong, which the purchaser is not, and while it is effectual against the wrong-doer, the reason of it does not exist as against the innocent man, as to whom it therefore fails. As Judge COOLEY says, it does not comport with notions of justice and equity, that against those who have done no wrong, these owners should recover three times the value of what they have lost. They have never spent one cent of money, nor one hour of labor, in changing this timber worth one dollar, into cord wood worth three. All this was done by some one else, and why should the owners recover for it? If they are compensated for what they have lost, and all they have lost, they are certainly fully paid. *Woolsey v. Seeley*, Wright, 360. And this is all they should be allowed to recover.

For this error in the charge on the subject of damages, the judgment is reversed.

Judgment reversed.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

HIGHT v. BACON.

(128 Mass. 10.)

Sale — implied warranty.

On a sale of personal property, where the purchaser inspects for himself the specific goods sold, and there is no express warranty, and the seller is guilty of no fraud, and is not himself the manufacturer of the goods sold, the doctrine of *caveat emptor* applies, although the seller may suppose that the goods are bought for the purpose to which the purchaser applies them. (See note, p. 641.)

ACTION on an account for leather sold and delivered. Answer, breach of warranty that the leather was good and fit for boots and shoes. The evidence showed that the plaintiffs were dealers in leather in Boston, and that the defendants were manufacturers of boots and shoes in Milford; that the leather was sold at the store of the plaintiffs; that the defendants had full opportunity at the time of purchase to examine the whole quantity purchased, and did examine two rolls out of the twenty sold; and that the rolls examined were equal in quality to that of the bulk; that the leather was bought by the defendants to be manufactured into boots and shoes; that the plaintiffs, when the sale was made, supposed that such was the purpose for which it was bought, but nothing was said at the sale about this purpose, although the defendant asked if the leather would crimp; and that the leather appeared to be

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good, and both parties believed it to be suitable for the purpose above stated ; that the leather was rotten and unfit to be made into boots and shoes.

Defendants, pro se.

E. O. Shepard, for plaintiffs.

COLT, J. The judge before whom this case was tried found as a fact that there was no express warranty by the plaintiffs of the quality of the leather sold to the defendants ; and ruled, as matter of law, that, on the evidence stated in the bill of exceptions, there could be no implied warranty binding upon the plaintiffs.

There was nothing at the time of the sale said by either party of the purpose for which the leather was bought ; and the evidence that the defendants were manufacturers of boots and shoes, and at the time of the sale asked the plaintiffs if the leather would crimp, is not sufficient to prove an implied warranty on the part of the plaintiffs, that the leather was suitable for the purpose of being manufactured into boots and shoes, even if the plaintiffs supposed it was bought for that purpose.

It is said that when a manufacturer or dealer contracts to supply an article which he manufactures, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is, in that case, an implied warranty that the article is reasonably fit for the purpose to which it is to be applied. *French v. Vining*, 102 Mass. 132, 135; s. c., 3 Am. Rep. 440; *Jones v. Just*, L. R., 3 Q. B. 197. But where the purchaser inspects for himself the specific goods sold, and there is no express warranty, and the seller is guilty of no fraud, and is not himself the manufacturer of the goods sold, the doctrine of *caveat emptor* applies. *Barnard v. Kellogg*, 10 Wall. 383; *Cunningham v. Hall*, 4 Allen, 268; *Dounce v. Dow*, 64 N. Y. 411.

The case at bar is an action upon an executed sale by one dealer to another of a specific quantity of leather, which the seller did not manufacture, and as to the quality of which he had no superior information. The parties stood on an equal footing ; the buyer had full opportunity to examine the goods in the store of the plaintiffs, and did, in fact, examine two rolls, which were fair samples of the lot. There was no fraud practiced. The leather appeared to be

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good, and both parties believed it to be good and suitable for the purpose of being manufactured into boots and shoes. It is plain that the buyer inspected and selected the leather himself, without relying on the skill and judgment of the seller. The particular use which was to be made of it was not made known by the buyer at the time of the sale, in such a way as to indicate a purpose to put upon the seller the responsibility of furnishing an article reasonably fit for the purpose to which it was to be applied. The defect complained of was a latent defect. *Howard v. Emerson*, 110 Mass. 329; s. c., 14 Am. Rep. 608; *Deming v. Foster*, 42 N. H. 165.

The defendants offered to prove a usage of the trade, which gives the buyer a right to revoke the contract where leather which appears to be good is sold as good, but turns out to be rotten and nearly worthless. But this defense is not open under the answer in this case. The answer does not allege that the sale had been revoked by the defendants. It is unnecessary to consider whether the usage offered to be proved is a valid usage.

Exceptions overruled.

NOTE BY THE REPORTER. — In *Gerst v. Jones*, Virginia Supreme Court of Appeals, November, 1879, 21 A. L. J. 111, the principle of this case is recognized. The court say: "One of the most recent and best considered decisions on this subject is that of *Jones v. Just*, L. R., 3 Q. B. 197; 37 L. J. Q. B. 399. MELLOR, J., in delivering the judgment, reviewed the decisions with great clearness and ability. Among other things, he said, where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term of warranty that it shall be reasonably fit for the purpose to which it is to be applied. In such case the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own. See Benjamin on Sales, § 655, and numerous cases cited in notes.

These principles are decisive of the case in hand. The transaction was not a sale of an existing chattel selected by the plaintiffs, but an executory contract to manufacture and deliver from time to time, as they might be needed, a number of tobacco boxes for a particular purpose, known to the defendant. The defendant, in undertaking to furnish the boxes, impliedly agreed that they should be reasonably fit for that purpose. Had the plaintiffs gone to the defendant's factory and themselves selected certain boxes such as they believed would answer their purpose, it is very clear the defendant would not be liable, however worthless the boxes might be, because the plaintiffs in that case must have relied on their own skill and judgment exclusively. But the plaintiffs made no selection; they left that to the defendant; they relied upon his skill and judgment as a manufacturer to furnish an article suited to the business in which they were engaged.

"If," said TINDALL, C. J., in *Brown v. Edgington*, "the purchaser relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, the transaction carries with it an implied warranty that the thing furnished shall be fit and proper for the purpose for which it was designed."

See, also, *Bragg v. Morrill*, 49 Vt. 45; s. c., 24 Am. Rep. 102, and note, 104.

Higgins v. McCabe.

HIGGINS V. MCCABE.

(128 Mass. 13.)

Negligence — malpractice — midwife acting as oculist.

The defendant was a midwife who attended the plaintiff's mother at the plaintiff's birth, and a disease of the plaintiff's eyes being called to her attention a few days after birth, she said it was not serious, that she could cure it and had cured others of a similar affection, and told the plaintiff's mother not to call in a physician, and, having prescribed some simple washes, the plaintiff became blind. It appeared that the disease was serious but curable, and that the remedies applied were improper. *Held*, that in the absence of evidence that the care of the child's eyes was part of a midwife's ordinary duties, it must be regarded as not embraced in the contract, and as gratuitous, and that no recovery could be had for damages.

ACTION of damages for malpractice. The defendant was a midwife, who attended the plaintiff's mother at the plaintiff's birth, and a disease of the plaintiff's eyes being called to her attention a few days after birth, she said she could cure it and had cured others of a similar affection, and told the plaintiff's mother not to call in a physician. She prescribed some simple washes for the child, and the child became blind. It was shown that the disease was serious but curable, and that the remedies applied were improper. The other facts appear in the opinion. Verdict for defendant.

M. H. Swett, for plaintiff. 1. The fact that the defendant assumed to be competent to treat the disease, and did treat it in an ignorant or negligent manner, renders her liable. *Pippin v. Shepard*, 11 Price, 400; *Rex v. Spiller*, 5 C. & P. 333; *Ruddock v. Lowe*, 4 F. & F. 519; *Jones v. Fay*, id. 525; *Seare v. Prentiss*, 8 East, 348; *Slater v. Baker*, 2 Wils. 359; *Long v. Morrison*, 14 Ind. 595; *Carpenter v. Blake*, 60 Barb. 488. 2. If material the question should have been left to the jury whether the care of the child's eyes was not within the original contract entered into with the defendant, and if not, whether there was not an implied contract by which the defendant would have been entitled to pay for the services performed in relation to the eyes. But even if the service was gratuitously rendered, the duty to exercise reasonable care and

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skill still existed, and the only question would be as to the degree of care and skill. *Coggs v. Bernard*, 2 Ld. Raym. 909; *Shiells v. Blackburne*, 1 H. Bl. 158; *Wilson v. Brett*, 11 M. & W. 113; *Gill v. Middleton*, 105 Mass. 477; *Jenkins v. Bacon*, 111 id. 373.

W. Gaston and J. W. O'Brien, for defendant.

COLT, J. This action proceeds upon the ground that the defendant failed to discharge a legal duty which she owed the plaintiff, resulting in the injury complained of. The question is whether the evidence relied on by the plaintiff would justify a verdict in favor of the child, and in the opinion of a majority of the court it would not.

It appears that the defendant was originally employed only as a midwife. The parents had employed her twice before in that capacity. There was no competent evidence that the treatment of diseases of the eyes which might be developed in the child was embraced in the duties which the defendant undertook as midwife; and there was no evidence that the defendant was unskillful or negligent in the performance of any of the duties with which she was properly chargeable in that capacity.

But it is insisted that independently of the employment as midwife the jury upon this evidence might properly find that the defendant, professing to have superior skill and experience, held herself out as competent to cure this particular disease, and thereupon was permitted by the mother to assume the treatment of it. The evidence on which it is sought to charge the defendant with this additional duty is found in the testimony of the mother, and that testimony must be construed with reference to the character and relation of the parties and the admitted facts in the case. The services of the defendant in respect to the cure of this disease were wholly gratuitous; they were performed as acts of benevolence only. The defendant was a midwife; the jury would not be justified in finding that she claimed to possess, or might reasonably be expected from her calling to have, the peculiar knowledge, skill and experience of an expert in such matters. The representations of the defendant, that she could cure the child with simple remedies and washes, that she had cured other children in the same way who were similarly afflicted, and that there was no need of a doctor, were but the expression of an opinion as to the efficacy of her reme-

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dies, and did not imply that she undertook to use that higher skill of the medical profession which is required in the treatment of the more complicated and delicate organs. The question was whether she had discharged the duty which she assumed with that skill which she professed to have, and with that diligence which might reasonably have been expected of her. Upon that question, the fact that the service was rendered without compensation must have an important, if not decisive, bearing. It is often said that a gratuitous agent is liable for gross negligence only; but without regard to degrees of negligence, it is plain that the duty imposed upon such an agent is less stringent than when the service undertaken is founded upon a consideration paid. Under the rule requiring ordinary care as applied to this case, we see no evidence of neglect in any degree. A physician must apply the skill and learning which belong to his profession; but a person who, without special qualifications, volunteers to attend the sick, can at most be only required to exercise the skill and diligence usually bestowed by persons of like qualifications under like circumstances. To hold otherwise would be to charge responsibility in damages upon all who make mistakes in the performance of kindly offices for the sick. *Gill v. Middleton*, 105 Mass. 477, 479; s. c., 7 Am. Rep. 548; *Leighton v. Sargent*, 11 Fost. 119; *Simonds v. Henry*, 39 Me. 155; *Lanphier v. Phipos*, 8 C. & P. 475; *Hancke v. Hooper*, 7 id. 81.

The defendant was attentive and diligent in her treatment of the child, and in the use of the remedies she proposed. There was evidence, it is true, from regular physicians, that if other and more powerful remedies had been seasonably applied they would probably have effected a cure; but these were remedies known to the medical profession, of which the defendant neither had nor professed to have knowledge. It was not a case where the defendant, as in the cases cited by the plaintiff, assumed to act as a regular surgeon or a regular practitioner. *Ruddock v. Lowe*, 4 F. & F. 519; *Jones v. Fay*, id. 525.

[Omitting a question of evidence.

Exceptions overruled.

Huff v. Ford.

HUFF V. FORD.

(126 Mass. 24.)

Master and servant — negligence — contractor.

The defendant's horse kicked a loose shoe through the plaintiff's window-glass. The horse was being driven by a person paid by the defendant, and by the latter let with a wagon by the day to a city in the work of paving streets. It was under the sole management of that person whose duty it was to keep it properly shod. *Held*, that the driver was at the time the servant of the defendant, and the defendant was liable for the injury.

ACTION for damages. The plaintiff was in the occupancy of a store on Bromfield street in Boston; a large plate-glass window of the store was broken by the defendant's horse kicking a loose shoe through it after he had been violently struck twice by the driver; the city was then repaving that street; the defendant owned the horse and wagon which he kept and let, furnishing a driver by the day at the time of the injury, to the city, and thus were then under the exclusive direction and control of the city as to the performance of the work of paving; the driver of the horse was paid by the defendant by the week; the driver had the entire management and care of the horse, and it was his business to see that he was properly shod, and to get him shod if he needed it. The plaintiff had judgment.

C. P. Hinds, for defendant.

F. L. Hayes, for plaintiff, was not called upon.

BY THE COURT. The driver, employed and paid by the defendant, and who had the entire management of the horses as to the manner of driving them, and whose duty it was to see that they were properly shod, was the servant of the defendant in so driving the horses and having them shod; and for injuries to third persons by his negligence in these respects, the defendant was responsible. Whether the damage to the plaintiff's property was caused by such negligence, or by mere accident, was a question for the jury, and appears to have been submitted to them without objection.

Exceptions overruled.

 Gilman v. Gilman.

GILMAN V. GILMAN.

(126 Mass. 26.)

Judgment — foreign — collateral impeachment of.

A judgment of another State, when sued upon here, may be impeached notwithstanding its recitals, by showing that there was no service of process nor authority for the appearance of the attorney.*

ACTION on a judgment recovered in Maine. The judgment was recovered, as the record showed, without personal service, upon the appearance of an attorney for the defendant, which was afterward withdrawn, and the defendant was defaulted. It was proved that this appearance was unauthorized, and the defendant had judgment below.

S. C. Maine & J. C. Carpenter, for plaintiffs.

R. D. Smith & M. M. Weston, for defendant.

GRAY, C. J. It has been often decided by this court that the record of a judgment of a court of another State is entitled to full faith and credit in this Commonwealth, under article 4, section 1 of the Constitution of the United States only when the court had jurisdiction of the cause and of the parties; and that the defendant, when sued upon the judgment here, may plead and prove, notwithstanding any recitals in the record thereof, that he was not duly served with process, and did not authorize an attorney to appear for him in the action in which the judgment was rendered. *Gleason v. Dodd*, 4 Metc. 333; *Phelps v. Brewer*, 9 Cush. 390; *Carlton v. Bickford*, 13 Gray, 591; *McDermott v. Clary*, 107 Mass. 501. It is only in the case of a domestic judgment that the defendant is put to his writ of error. *Bodurtha v. Goodrich*, 3 Gray, 508; *Finneran v. Leonard*, 7 Allen, 54; *Hendrick v. Whittemore*, 105 Mass. 23, 28; *Brainard v. Fowler*, 119 id. 262, 265.

The same view of the effect of a judgment of a court of one State, when sued on in another, has been affirmed, upon full consideration, by the Supreme Court of the United States, in two

*See *Ferguson v. Crawford* (70 N. Y. 263), 26 Am. Rep. 580; *Martin v. Gray* (19 Kans. 458), 27 Am. Rep. 149.

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recent decisions, in one of which the court said that "the party assailing the judgment should have shown that the counsel who appeared was not employed by the defendant," and in the other, that "in the case of non-residents, like that under consideration, personal service cannot be dispensed with, unless the defendant voluntarily appears." *Thompson v. Whitman*, 18 Wall. 457, 464; *Knowles v. Gas-light & Coke Co.*, 19 id. 58, 62.

The attachment and levy of execution upon the defendant's property in the State of Maine did not make the judgment binding upon him personally. *Woodward v. Tremere*, 6 Pick. 354; *Boyd v. Urquhart*, 1 Sprague, 423.

Exceptions overruled, with double costs.

COMMONWEALTH V. RICHARDSON.

(126 Mass. 34.)

Criminal law — polygamy — indictment.

An indictment for polygamy contained the usual allegations of the second marriage during the life-time of the former wife, but the proof showed that the first wife was divorced from the defendant at the time of the second marriage. The statute pronounced a second marriage under such circumstances polygamy. But as the crime may be committed in divers ways, it was held that the indictment must specify the manner of commission, and this indictment was therefore bad.

Whether without the statute the offense would have been polygamy, *query*.

CONVICTION of polygamy. The indictment was in the usual form, alleging a former marriage with Almira F. Belcher. The proof showed that the first wife procured a divorce from the defendant before his second marriage. The opinion states other facts.

A. De Wolf, for defendant.

C. R. Train, attorney-general, for the Commonwealth.

LORD, J. The status of a party, whose contract of marriage has been judicially dissolved for his fault, has not, in this Commonwealth, been precisely defined. In *Commonwealth v. Putnam*, 1

Pick. 136, Mr. Justice WILDE says: "By the divorce, the first marriage was dissolved, and but for the second section of the act of 1784, ch. 40, the second marriage would have been lawful by our laws;" and adds: "Notwithstanding the restraints imposed on the husband, he being the guilty cause of the divorce, the dissolution of the marriage contract was total, and not partial." In *West Cambridge v. Lexington*, 1 Pick. 506, Chief Justice PARKER, in giving the opinion of the court, speaks of such party as "not being in a legal sense a married man, and perhaps not to be considered as having a former wife living, the decree of divorce having terminated the relation of husband and wife." We do not deem it necessary in this case to determine whether any or what marital duties or obligations remain upon such person.

By the Gen. Stats. ch. 165, § 4, it is enacted that "whoever, having a former husband or wife living, marries another person, or continues to cohabit with such second husband or wife in this State, shall (except in cases mentioned in the following section) be deemed guilty of polygamy." The following section is in these words: "The provision of the preceding section shall not extend to any person whose husband or wife has been continually remaining beyond sea, or has voluntarily withdrawn from the other, and remained absent for the space of seven years together, the party marrying again not knowing the other to be living within that time, nor to any person legally divorced from the bonds of matrimony, and not the guilty cause of such divorce." This statute is substantially the same as the statute of 1784, ch. 40; and from that time, and for a period long before, to the present, has been in substance the law of the Province and the Commonwealth. The same provisions were incorporated into the Rev. Stats., ch. 130.

In *Commonwealth v. Putnam, ubi supra*, the guilty party in the divorce suit married again in another State, and was indicted for the crime of adultery in this State. In *Commonwealth v. Hunt*, 4 Cush. 49, the guilty party married again, also in another State, and the indictment charged her with lewd and lascivious cohabitation in this State with the party to whom she claimed to be married. In each of these cases the court held that the offense charged was not the offense committed. In the former case, the jury found a special verdict establishing the facts of the former marriage, the divorce for the defendant's adultery, his second marriage in Connecticut and his cohabitation in this State. Lincoln, in behalf of

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the defendant, in argument, is reported as saying: "Johnson defines adultery 'the act of violating the bed of a married person.' The defendant has not done this. He has not violated any plighted faith to his former wife." "The indictment might as well have been for polygamy as for adultery;" "though in truth he could not be indicted for either, unless he were a married man at the time of the second marriage." In declaring the result at which the court arrived, Mr. Justice WILDE utters the dictum, "The defendant should have been indicted on the second section of the act referred to," which is substantially the same as the Gen. Stats., ch. 164, §§ 4, 5. Although a dictum by that magistrate is always entitled to most respectful consideration, it is not to be regarded as the judgment of the court. The dictum is however qualified by the statement, "The second marriage, with all the other facts constituting the crime of polygamy, should have been set forth in the indictment, so that the defendant might have been prepared to answer and defend himself;" showing that that learned judge deemed it necessary that the divorce and the subsequent marriage of the guilty party should be alleged in the indictment. 1 Pick. 139. In the latter case Mr. Justice DEWEY speaks more cautiously, and says, "If the facts in this case afford ground for any indictment under the Revised Statutes, ch. 130, it would be more properly an indictment upon the second section, for unlawfully cohabiting within the State, with Davis, as husband and wife, the defendant having a former husband living, and not coming within the exception of the third section, as a person 'not the guilty cause of the divorce;'" decisively intimating that, if the indictment could be maintained under that statute, it must aver the facts which bring the party within its terms. 4 Cush. 50.

In *Commonwealth v. Lane*, 113 Mass. 458; s. c., 18 Am. Rep. 509, the question presented in this case did not arise, and was not considered by the court; for although the defendant was charged with polygamy, under the same statute, for marrying a second time during the life of the former wife, the defense was that his marriage was a legal marriage under the law of the State of New Hampshire where it was consummated, and the court so held.

These three cases, it is believed, are the only ones which have been decided in this Commonwealth in which the subsequent marriage of the guilty divorced party has been before the court upon an indictment. It is certain, that it has never been decided by this

court that such party can be convicted of polygamy under the provisions of the General Statutes, ch. 165, § 4, or the previous statutes of the same character. Nor do we deem it necessary, for reasons hereafter to be stated, now to decide that question.

If that question could be presented nakedly, it would be a matter deserving of grave consideration whether the party charged could be said in criminal pleading to be one having a husband or wife living, or as being a lawful husband or wife, but we are quite certain that the facts should be stated which bring the party within the provisions of the statute. It is to be noticed that the exceptions in the statute are not such as are ordinarily introduced in legislation affecting the act done, but relate entirely to the person, and without these exceptions the law would perhaps be construed the same as with them. See *Commonwealth v. Jennings*, 121 Mass. 47; s. c., 23 Am. Rep. 249. But two classes of persons are referred to in the provisos. The first class includes "Any person whose husband or wife has been continually remaining beyond sea, or has voluntarily withdrawn from the other, and remained absent for the space of seven years together, the party marrying not knowing the other to be living." In such case the party is presumed to be dead; and although, if he or she should return, the marriage might be void, it certainly would be straining the law to hold such one criminally guilty in doing an act which he or she, by law, might properly presume to be a lawful act. *Commonwealth v. Thompson*, 6 Allen, 591, and 11 id. 23. The other class includes such as are lawfully divorced, being innocent. Under the law he or she is entitled to have the marriage contract dissolved. Certainly, without any proviso or exception no such person, on marrying again, could be deemed to be guilty of polygamy; and it is not improbable that the exception was inserted out of extreme caution, and possibly because the act of 1784 had an exception of a similar character. It was this: "Provided, also, that this act or any thing therein contained shall not extend to the wife of any married man who shall willingly absent himself from his said wife, by the space of seven years together, without making suitable provision for her support and maintenance in the mean time, if it shall be in his power so to do."

The statute of 1874 was but a re-enactment, with of course a different penalty, of the Province law of 6 W. & M., 1694-5, ch. 5, against polygamy, with a proviso in relation to continuous absence in

almost the identical language of the general statutes, ch. 165, 1 Prov. Laws (State ed.), 171. The statute of 6 W. & M., ch. 5, contains also a proviso excepting from its operation divorced parties, but does not distinguish between the guilty and innocent party; its language being, "shall not extend to any person or persons, that are or shall be at the time of such marriage divorced by any sentence had, or hereafter to be had, as the law of the Province in that case has provided."

Whether the guilty party would at that time have been deemed a divorced party, it is not necessary to inquire. Four years later, by Stat. 10 Wm. III (1698), ch. 19, the proviso in relation to time of absence was modified, and it was enacted, "that if any married person, man or woman, has lately or shall hereafter go to sea in any ship or other vessel, bound from one port to another, where the passage is usually made in three months' time, and such ship or other vessel has not been, or shall not be heard of within the space of three full years next after their putting to sea from such port, or shall only be heard of under such circumstances, as may rather confirm the opinion, commonly received, of the whole company's being utterly lost, in every such case, the matter being laid before the governor and council, and made to appear, the man or woman, whose relation is in this manner parted from him or her, may be esteemed single and unmarried; and upon such declaration thereof, and license obtained from that board, may lawfully marry again; any law, usage, or custom to the contrary notwithstanding." 1 Prov. Laws, 353.

Such being the history of the law and its condition till 1841, we feel warranted in inferring that, at that time, the legislature did not deem the marriage of the guilty party who had been divorced to be polygamy; for in that year was enacted the following statute: "Whenever a divorce from the bond of matrimony shall be decreed for any cause allowed by law, the guilty party shall be debarred from contracting marriage during the life-time of the innocent party; and if the guilty party should contract such marriage, the same shall be void, and such party shall be adjudged guilty of polygamy." Stat. 1841, ch. 83. This is substantially re-enacted in the Gen. Stats., ch. 107, § 25.

This kind of legislation has many precedents. Any person who embezzles property is deemed by the statute to have committed the crime of larceny; it is not sufficient, however, in an indict-

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ment for such offense, simply to charge stealing in the usual manner, but the facts which constitute the embezzlement must be set out, with the averment of the legal conclusion that thereby and by force of the statute the party charged has committed the crime of larceny.

If however we assume that, prior to the Stat. of 1841, a divorced party, being the guilty cause of the divorce, might be guilty of polygamy by marrying again during the life of his former wife, still the result must be the same, in this case, as if no such offense could, prior to that statute, be committed ; for it is quite clear that under the existing statutes, the crime of polygamy may be committed by persons under entirely diverse circumstances, and by the familiar rules of pleading, a party charged with an offense is entitled to a statement in the indictment of the facts which constitute the offense ; and, if an offense may be committed in either of various modes, the party charged is entitled to have that mode stated in the indictment which is proved at the trial ; and when one mode is stated and proof of the commission of the offense by a different mode is offered, such evidence is incompetent by reason of variance. It is clear, therefore, that whether we decide that the offense of polygamy might have been committed by the guilty divorced party or not, the result must be the same ; for the facts proved would show either that no crime was committed, or if committed, there was a variance between the *allegata* and the *probata*.

New trial ordered.

COMMONWEALTH V. DEJARDIN.

(126 Mass. 46.)

Criminal law — obscene pictures — “ naked.”

An indictment for printing and publishing obscene pictures of naked girls is not sustained by proof of printing and publishing obscene pictures of girls naked only above the waist.

CONVICTION of printing and publishing obscene pictures of naked girls. The opinion states the facts.

M. Reed & H. A. Dubuque, for defendant.

C. R. Train, attorney-general, for the Commonwealth.

MORTON, J. The defendant is indicted under the Stat. of 1862, ch. 168, § 1, which provides that "whoever imports, prints, publishes, sells, or distributes any book, pamphlet, ballad, printed paper, or other thing containing obscene, indecent or impure language, or any obscene, indecent or impure prints, pictures, figures, or descriptions, manifestly tending to the corruption of the morals of youth; or introduces into any family, school or place of education; or buys, procures, receives, or has in his possession any such book, pamphlet, ballad, printed paper, or other thing, either for the purpose of sale, exhibition, loan or circulation, or with intent to introduce the same into any family, school or place of education, shall be punished" by imprisonment in the State prison, or by fine and imprisonment in the jail.

It is clear that this indictment is founded on the first clause of the statute. This clause prohibits the importation, printing, publishing, selling, or distributing "any book, pamphlet, ballad, printed paper, or other thing," containing obscene, indecent or impure language, or containing any obscene, indecent or impure prints, pictures, figures or descriptions, manifestly tending to the corruption of the morals of youth. The second and fourth sections, providing for issuing search-warrants for "any obscene, indecent or impure books, pamphlets, ballads, printed papers or other things," tend strongly to show that such is the true construction of the first section. An indictment under this clause should aver that the defendant imported, printed, published, sold, or distributed a book, pamphlet, ballad, printed paper or other thing, describing it, containing obscene or indecent language, or obscene or indecent prints, pictures, figures or descriptions, describing them, or giving an excuse for not particularly describing them. *Commonwealth v. Holmes*, 17 Mass. 336; "*Commonwealth v. Tarbox*, 1 Cush. 66. The general words "or other thing" must be construed to mean "or other thing of like kind." The maxim *noscitur a sociis* applies.

The indictment in this case avers that the defendant "unlawfully and scandalously did print and publish certain obscene pictures, figures, and descriptions, to wit, pictures, figures and descriptions of naked girls, manifestly tending to the corruption of the morals of youth." It is not necessary to decide whether this indictment can be held to be sufficient under the statute. If it can be, there was a fatal variance between the allegation and the proof. The

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court admitted evidence that the defendant took photographic pictures of two young girls naked down to the waist; and instructed the jury, that if they found such pictures to be obscene and indecent, and to have been delivered to the girls, they should convict the defendant.

This was erroneous. The allegation that the defendant printed and published pictures and figures of naked girls is not met by proof that he printed and published pictures and figures of girls, for the greater part clothed. The government, having described the pictures, is bound by the description, and the defendant could not be convicted upon proof that he printed and published pictures substantially different from the description, though the jury might find such pictures to be obscene.

Exceptions sustained.

BURGESS V. EQUITABLE MARINE INSURANCE CO.

(126 Mass. 70.)

Insurance — marine — deviation.

A policy of insurance was issued on a cod-fishing vessel, for the voyage from Plymouth to the Banks cod-fishing, and back. After arriving at the Banks, the vessel got out of bait and put in to St. Peter's, the nearest practicable port for a supply. *Held*, in the absence of proof of usage, a fatal deviation.

ACTION on a policy of marine insurance on a fishing vessel. The answer was a deviation in putting into a port not named, for bait. The opinion states the other facts. The plaintiff had a verdict subject to the opinion of this court.

J. C. Dodge, for defendant.

J. Lathrop and *A. Mason*, for plaintiff. The true rule is simply that without regard to the question of benefit to the insurer, a departure from the course of the voyage from "necessity or just cause," is not a deviation. *Weskett on Ins.* (ed. 1781) 168; *Millar on Ins.* 405; *Park on Ins.* (8th ed.) 619, 647; 2 *Arnould on Ins.* 464; *Marsh on Ins.* (5th ed.) 157; 3 *Kent's Com.* 316; 1 *Phil. on Ins.*, § 977. The word "necessity" means in commercial law what is "reason-

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ably fit and proper," under all the circumstances of the case. *Somes v. Sugrue*, 4 C. & P. 276; *The Amelie*, 6 Wall. 18; *The Fortitude*, 3 Sumner, 228, 248; *Gordon v. Mass. Ins. Co.*, 2 Pick. 249; *Bliss v. Ropes*, 9 Allen, 339, 341, 343. In many cases a departure from the course of the voyage has been held to be justifiable where it was not in the least for the benefit of the insurer, but merely for the benefit of other interests. Thus in *Dunlop v. Allan*, Millar on Ins. 414, a departure was held not to be a deviation, although the plaintiff's goods could have been carried to and delivered at the port of destination, and the departure was made to avoid seizure of the ship and the rest of the cargo. And a departure to avoid a peril not insured against is not a deviation. *Scott v. Thompson*, 1 N. R. 181; *Green v. Elmslie*, Peake, 212; *Robinson v. Mar. Ins. Co.*, 2 Johns. 89. See also *Driscoll v. Passmore*, 1 B. & P. 200; *Driscoll v. Bowl*, id. 313; *Stocker v. Harris*, 3 Mass. 409; *Clark v. United Ins. Co.*, 7 id. 866; 5 Am. Dec. 50; *Coolidge v. Gray*, 8 id. 527; *Riggin v. Patapsco Ins. Co.*, 7 Har. & J. 279; *Pourverin v. La. State Ins. Co.*, 4 Rob. (La.) 234; *Thomas v. Royal Exchange Assurance*, 1 Price, 195; *Perkins v. Augusta Ins. Co.*, 10 Gray, 312; *The Teutonia*, L. R., 4 P. C. 171, 179.

ENDICOTT, J. By the terms of the policy the vessel was insured "at and from Plymouth to the Banks, cod-fishing, and at and thence back to Plymouth." This is a definite and distinct description of the contemplated voyage between two fixed termini. The Banks are named as the outward terminus, and while there engaged in cod-fishing and until her return to Plymouth the vessel was covered by the policy. The language used is not open to the construction that it was the intention of the parties to insure her while prosecuting the adventure elsewhere, or doing what was necessary to make it successful outside and beyond the prescribed limits. A voyage is the sailing of a vessel from one port or place to another port or place, and the purpose for which it is to be conducted, whether as a trading, freighting or fishing voyage, is often mentioned in policies of insurance. But this designation cannot vary or extend the description, route or termini of the voyage as named in the policy, unless some usage connected with the particular trade or adventure is shown to exist. No evidence was offered of a usage in such voyages to leave the Banks and go into port for bait. So far as the evidence reported discloses any usage in that regard, it appears that for some years it had been the practice to

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carry out a limited amount of bait, and to rely upon obtaining an additional supply on the Banks. Such being the practice to obtain bait on the Banks when the supply taken out was exhausted, a departure from the Banks for that purpose could not have been contemplated by the parties in making the policy. We have, therefore, a definite description of the voyage in the policy, and a usage that does not extend its provisions. The question decided in *Friend v. Gloucester Ins. Co.*, 113 Mass. 326, arose upon a clause in a policy prohibiting a fishing vessel from sailing on a voyage east of Cape Sable after a certain date, and throws no light upon the construction to be given to the words of this policy. The decision in *The Tarquin*, 2 Lowell, 358, turned upon the construction of the shipping articles of seamen, and not of a policy of insurance.

We are, therefore, of opinion that the vessel, by leaving the Banks and going to St. Peter's for bait, departed from the voyage described in the policy, and the only question to be determined is whether in law there has been a deviation which avoids the policy.

It may be stated in general terms that the assured is protected by his policy while the vessel pursues the usual and customary course of the voyage, but any departure from the course, or delay in prosecuting it, without necessity or just cause, is a deviation, and discharges the insurer, because another voyage has been voluntarily substituted for that which was insured. Whether the degree or period of the risk is increased is unimportant, as the assured has no right to substitute a different risk. Whenever, therefore, there is a manifest departure from the course of the voyage, the assured must show that it was justified by the necessity of the case. *Stocker v. Harris*, 3 Mass. 409, 418; *Brasier v. Clap*, 5 id. 1; *Coffin v. Newburyport Ins. Co.*, 9 id. 436, 449; *Kettell v. Wiggin*, 13 id. 68.

In the case at bar, the alleged necessity arose from scarcity of bait. The plaintiff did not put on board, when the vessel sailed from Plymouth, enough for the entire trip. Squid had been plenty on the Banks during several years prior to 1874, and the plaintiff relied upon catching them there and using them for that purpose. They happened this season to be very scarce, and after fishing three weeks, and nearly exhausting his supply, the master sailed for St. Peter's, over one hundred miles distant, procured bait, and returned to the Banks after an absence of a week. It is to be observed, that this so-called necessity did not arise from any peril in-

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insured against in the policy, or ordinarily insured against in policies of insurance, and did not involve the safety of the vessel, or of any property on board; it had relation solely to the success of the fishing adventure; and in this the defendant had no interest and had assumed no responsibility.

We are of opinion that the claim of the plaintiff cannot be sustained; and that a necessity to justify the departure in this case cannot be found in the fact that, without going to St. Peter's for bait, the voyage would have failed to be successful or profitable to the plaintiff.

The strictness with which the courts have held the insured to the route named in the policy is illustrated by the cases already cited, and by many others cited at the argument. *Dodge v. Essex Ins. Co.*, 12 Gray, 65; *Middlewood v. Blakes*, 7 T. R. 162; *Brown v. Tayleur*, 4 A. & E. 241; *Fernandez v. Great Western Ins. Co.*, 48 N. Y. 571; s. c., 8 Am. Rep. 571; *Merchants' Ins. Co. v. Algeo*, 32 Penn. St. 330. But the question to be determined here is, what is the nature and extent of the necessity or just cause which will warrant a departure from the route.

In this connection it may be well to refer to the necessities which clearly justify a departure. There is no deviation when the master is compelled by force, either to depart from his route, or delay its prosecution by the acts of his crew (*Elton v. Brogden*, 2 Str. 1264; *Driscoll v. Passmore*, 1 B. & P. 200; *Driscoll v. Bovil*, id. 313); or where he is detained by those in authority, or taken out of his course by a ship of war. *Scott v. Thompson*, 1 N. R. 181. In *Phelps v. Auldjo*, 2 Camp. 350, a master was ordered to sail out and examine a vessel in the offing, by a captain of a king's ship, and it appearing that he complied without remonstrance or threat of force, it was held to be a deviation. In cases of this description there must be a *vis major*, compelling a departure or delay, which excuses the master. So where the master is obliged to leave his course, or delay by stress of weather or other peril of the sea, or to go into port to repair or refit, or to re-man or recruit his crew disabled by sickness or reduced by casualties, or to avoid capture or to join convoy in time of war, there is no deviation. It is unnecessary to cite all the cases which fall within these exceptions; many of those relied on by the plaintiff are clearly within them. *Dunlop v. Allan*, Millar on Ins. 414; *Green v. Elmslie*, Peake, 212; *Clark v. United Ins. Co.*, 7 Mass. 365; 5 Am. Dec. 50.

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The case last cited is put upon the express ground that the ship was prevented by causes insured against from proceeding on her route, and the departure was from necessity. See, also, *Folsom v. Merchants' Ins. Co.*, 38 Me. 414.

Nor is the departure from the route for the purpose of saving human life a deviation; nor is a policy avoided when the ship goes out of her course to obtain necessary medical assistance for those lawfully on board. *Bond v. Brig Cora*, 2 Wash. C. C. 80; *Perkins v. Augusta Ins. Co.*, 10 Gray, 312. In this class of cases the justification does not rest on the same ground as in those previously noticed. It is allowed from motives of humanity, and cannot be extended to the saving or protection of property. In all other cases the necessity must be a real and imperative necessity affecting the vessel, such as actual force preventing the master from exercising his will, peril of the sea, danger of capture, want of repair, disability of the crew, or unseaworthiness, occurring under such circumstances that the master, acting upon his best judgment for the interest of all parties, has no alternative, and is forced to leave his route, or delay its prosecution.

When the departure is caused by such a necessity, the change of route in no respect alters the insurance; because the course of a sea voyage must at times be necessarily subject to extraordinary perils of the sea, and contingencies beyond the control of the master, and in the presence of which he is forced to succumb; and when they occur, and he is obliged to depart from the usual course of the voyage, there is no deviation in the legal sense of the term, for the departure is the necessary incident of the route named in the policy, as prosecuted at the time by the ship. The probability of such occurrences is well understood; they are known perils of the voyage, and enter into the ordinary contract of marine insurance. And when the master, compelled by the necessity, does that which is for the benefit of all concerned, the act is within the intention of the policy, as much as if expressed in terms. It would be practically impossible to state in the policy all the perils which might arise in a sea voyage and excuse departure from the route; and therefore, by the rules of interpretation applicable to this species of contract, the policy is held by implication to include them. See *Greene v. Pacific Ins. Co.*, 9 Allen, 217, 219. In such a policy as this, the necessities justifying a departure, in the absence of usage, from the route, and a visit to a port not named, are those

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which are caused by some peril occurring in the prosecution of the voyage within the limits named in the policy, and not those which arise in the prosecution of the business for which the voyage was undertaken.

It is true, there is a class of cases much relied on by the plaintiff, where the test is whether the ship at the time of the alleged deviation was pursuing the object and business of the voyage. But those are cases of delay, where the ship was at the port or place named or permitted in the policy. The permission in a policy to go to certain ports or places must always be construed in reference to the purpose of the voyage. *Williams v. Shee*, 3 Camp. 469; 1 Arnould on Ins., §§ 141, 142. Any delay for the prosecution of other business, or any unreasonable delay in prosecuting the business of the voyage at such port is a deviation. *African Merchants v. British Ins. Co.*, L. R., 8 Ex. 154. But if the delay was necessary in order to accomplish the objects of the voyage, and was reasonable under the circumstances of the case, then there is no deviation. *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383; *Phillips v. Irving*, 7 Man. & Gr. 325. In other words, if a ship is at a place permitted, the delay shall not be a deviation, if it is necessary in the proper prosecution of the business of the voyage. But this test cannot be applied to a departure from the route to a port not named or permitted, for the purpose of the adventure. In all trading voyages, for example, the ship is confined to the ports or coasts named in the policy, and she cannot depart to other places, simply because she may better prosecute the trade elsewhere. If the departure from the route to insure the success of the adventure can be justified as a necessity, it would be difficult to state any limit to the privilege, or to the duration of the insurance, and in the absence of permission to do so in the policy, it cannot be implied. See *Kettell v. Wiggin*, 13 Mass. 68; *Robertson v. Columbian Ins. Co.*, 8 Johns. 491. The plaintiff's vessel might have delayed for any reasonable time upon the Banks for the purpose of fishing or getting bait, without being guilty of deviation; and would have been protected by the policy, even without proof of usage, because fishing was the purpose of the voyage, and she could properly prosecute it within the route named in the policy. *Noble v. Kennoway*, 2 Doug. 510, 513. But she could not go beyond or away from the route for that purpose.

The illustration put by the defendant's counsel is apposite: "If a vessel insured to Havana and back should learn, before entering

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the port, that there was no cargo there with which she could be loaded, no one would say that her policy protected her in going to the nearest port where a cargo could be had." Other illustrations may be given. If a vessel insured to a particular port, having letters of credit, should find on arrival that the parties on whom they were drawn had failed, she could not go to another port for funds, and return for her cargo, and be protected by her policy. If fish had been scarce on the Banks in 1874, it would hardly be contended that the vessel could have gone to other fishing-grounds to fish, although not more distant than St. Peter's, and yet, if she was justified by necessity in leaving to obtain bait at St. Peter's and to return in order to make the trip successful, it would be difficult to hold that the same necessity would not allow her to fish elsewhere.

In the argument of the plaintiff's counsel, no case was cited which sustains the position he has assumed, and we are not aware of any case which goes to this extent. In *Greene v. Pacific Ins. Co.*, 9 Allen, 217, the voyage was broken up by reason of perils to the ship insured against in the policy, and the question was as to the right to abandon. In *Stocker v. Harris*, 3 Mass. 409, which is strongly relied on by the plaintiff, an American ship sailing under Spanish colors, as allowed by the policy, delayed at Vera Cruz five months for the purpose of recovering outward cargo, which had been seized after landing by the authorities. The captain failed to obtain a restitution, and being unable to obtain a clearance from Vera Cruz to the United States under Spanish colors, without giving bond to land his cargo in some part of the dominion of Spain, and there being a partner of a Spanish house in Havana, by whose assistance he could restore the character of his ship as an American bottom, he took a cargo and freight and sailed for Havana. It is stated in the opinion, though not necessary to the decision, that the delay at Vera Cruz was not a deviation. And it was said by the court: "It may be understood that the insurers, by this policy" (which was on ship, cargo and freight), "were not interested in the outward cargo, after it had been safely landed from the ship. But the captain is the common agent of the concerned, and it is his duty to manage their distinct and separate, as well as their joint interests, according to his best judgment; and whatever is fairly done with this purpose is within the course of the voyage." This is simply stating, in another form of words, that the object for which the ship was at

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Vera Cruz was the disposal of her cargo, and if the delay was occasioned by fairly attempting to do so, there was no deviation. But the case was decided for the defendant, on the ground that, in sailing for Havana, instead of to a port in the United States, as required by the policy, the ship deviated, and that the reason for doing so was not such a necessity as justified the departure. It was suggested, in giving the reasons for this decision, that if the partner had died, or had left Havana before the ship arrived, then by force of the same necessity a voyage to some other Spanish port or ports would have been equally excused ; and thus the ship might have made several passages, although by the terms of the policy she was only insured from Vera Cruz to the United States ; and that this would have been to engage the insurer in an unlimited voyage and risk. The same suggestion would be applicable in this case. If the master had failed to find bait at St. Peter's, the same necessity would have justified him in visiting port after port until he found it.

As in the opinion of the court the trip to St. Peter's was a deviation which discharged the insurer, by the terms of the report there must be

Judgment for defendant.

JONES V. GRANITE MILLS.

(126 Mass. 84.)

Master and servant — negligence — of fellow-servant.

The plaintiff, an employee of defendant, was injured while escaping from defendant's burning mill. The fire was caused by the heating of machinery, and might easily have been extinguished at first, but although there was a cistern with pipes and hose, the water would not run. *Held*, in the absence of other evidence, that this failure must be attributed to the negligence of the plaintiff's fellow-servants, either in care or operation, and she could not recover for the injury. In the absence of statutory requirements, the defendant was not bound to furnish means of escape from fires, not caused by its negligence.

ACTION for personal injuries received by the plaintiff while employed in the defendant's mill, by reason of the burning of the mill. The plaintiff offered to prove that the mill was a large building, five stories in height, with an attic ; that each story contained one large room ; that the only way of entrance to the several

stories was through a tower on the outside of the mill, with stairs leading from story to story and coming to the platform of each story, and sufficient at all ordinary times to allow the operatives a passageway in and out; that this tower went up to the edge of the roof, to the sixth story; that on each side of this tower were fire escapes coming up from the ground to the fifth story, and there stopping, leaving the sixth story without any means of escape save by going down the tower or jumping from the gable windows of the room; that the plaintiff, a woman between twenty and thirty years old, had been at work at the mill about two years, in the upper room, spinning cotton; that the spinning-rooms are inflammable, dangerous, and require constant care and watching to prevent fire; that about seven o'clock in the morning of September 19, 1874, a fire broke out in the fourth story, caused by the heating of a bearing in one of the mules, which, when first seen, was about the size of the flame of a candle; that it was first discovered by a man not in charge of that mule, who, on seeing it, ran to the end of the room, where there was a hose coiled up and hung upon a hook, having a nozzle to it and means for stopping and starting the water; that he uncoiled the hose, and turned the valve in the pipe leading from a cistern in the top of the building, from which another pipe led to each story, and ran with the hose toward the fire; that when he got near the fire, he opened the stop-cock on the hose-pipe to let the water come out, but none came; that he then dropped it and ran to the sink at the end of the room, and got a vessel of water and ran and threw it on the fire, but that did no good, the fire having got too much headway by that time; that no alarm up to that time had been made; but the alarm became general in that room, and the occupants all ran down out of the building; that in the fifth story the work was still going on, and the alarm was first given there by the fire drawing up the tower and the smoke coming into that room; that when the smoke rushed up into the sixth story the fire had so far progressed that escape by the tower was deemed impossible, that some tried it, but died, and some escaped by jumping; that the plaintiff, after trying the tower, ran back to the end of the room, and taking hold of a wrap of yarn let herself down as far as she could, and then dropped the rest of the way, causing the injuries in question; that about twenty persons were either burnt or killed in jumping, and a great many wounded; that the hose and the apparatus for water were apparently, and to all out-

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ward appearances, in good order, and they had been, not frequently, but occasionally during the summer, tried to see if they were in order. The judge reserved the case for the consideration of the full court.

B. F. Butler (*E. L. Barney* with him), for plaintiff. An employer is under an implied contract or warranty to his employees to use due care to adopt and maintain in fit condition suitable instruments, means, and appliances with which the services required are to be performed, and a suitable place in which such services can be performed in safety, the employee, on his part, exercising due care. *Cayzer v. Taylor*, 10 Gray, 274; *Snow v. Housatonic Railroad*, 8 Allen, 441; *Gilman v. Eastern Railroad*, 10 id. 233, and 13 id. 433; *Combs v. New Bedford Cordage Co.*, 102 Mass. 572; s. c., 3 Am. Rep. 506; *Huddleston v. Lowell Machine Shop*, 106 id. 282; *Ford v. Fitchburg Railroad*, 110 id. 240; s. c., 14 Am. Rep. 598; *Arkerson v. Dennison*, 117 Mass. 407; *Hill v. Winsor*, 118 id. 251; *Sullivan v. India Manuf. Co.*, 113 id. 396; *O'Connor v. Adams*, 120 id. 427; *Kelly v. Norcross*, 121 id. 508.

E. R. Hoar, for defendant.

ENDICOTT, J. In examining the questions presented in this case, it is important to ascertain the specific acts of negligence on the part of the defendant, relied on by the plaintiff in her offer of proof.

No question is made but that the defendant's mill was strong and well built, safe and convenient for the usual and customary work carried on within it. It had a single staircase, placed within a tower, affording means of communication between the different stories, and of entering and leaving all parts of the mill, which was ample and sufficient under ordinary circumstances, taking into view the character of the business and the number of persons employed. Nor is it contended that the fire originated or was occasioned by the negligence of the defendant. It was caused by the heating of a mule bearing. All attempts to check it proved ineffectual. It spread rapidly; the tower filled with smoke and flame, so that escape by the staircase was impossible. There were no other means of exit, and the plaintiff, to avoid the danger, attempted to escape by a window, and fell to the ground, suffering severe injury.

The negligence imputed to the defendant is twofold: first, that no proper and sufficient means of extinguishing fire, if it should occur, were provided; and second, that there were no sufficient means of escape in case of fire.

If the fire had occurred by the negligence of the defendant, a liability might have arisen, on the ground that a person injured while attempting to escape a danger caused by the negligent act of another may maintain an action for the injury. And it may be, that when fire is a casualty peculiarly incident to, and reasonably to be anticipated in, the prosecution of a particular business, the employer is bound to take proper precautions against its occurrence. It may also be his duty to have proper means and appliances at hand to check it speedily when it does occur, on the ground that his failure to do so may bear upon the question whether he is responsible for the fire itself; and it might in some cases be difficult to draw the line between the precautions necessary to prevent its occurrence and those necessary to check it in the outset. But we are not called on to decide these points, for they do not necessarily arise in this case. For even if we assume that such obligations rest upon the employer, no evidence was offered tending to show that the defendant failed to take proper precautions to prevent fire, or that the hose, tanks, and other appliances for extinguishing it were not all that under any circumstances would be required. The evidence offered was simply that the water did not run when the fellow-servants of the plaintiff attempted to use it. This was not sufficient proof of negligence to charge the defendant. The defendant, in any aspect of the case, had done its whole duty when it supplied the proper appliances, the care and use of which must be necessarily intrusted to its servants. The failure of the water to run must therefore be attributed to the negligence of fellow-servants, either in failing to keep the apparatus in proper order or in negligently putting it in operation. *Cooper v. Hamilton Manuf. Co.*, 14 Allen, 193; *Kendall v. Boston*, 118 Mass. 234; s. c., 19 Am. Rep. 446; *Joy v. Winnisimmet Co.*, 114 Mass. 63; *King v. Boston & Worcester Railroad*, 9 Cush. 112; *Allen v. New Gas Co.*, L. R., 1 Ex. D. 251.

In either aspect of the question, the defendant is not liable. If the fire was not a casualty peculiarly incident to the business, and reasonably to be anticipated, then no obligation rested upon the defendant to guard against it in any way; if it was so incident to

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the business, the defendant having taken all proper precautions, and supplied all requisite appliances, which failed to work in the emergency through no fault on its part, then there is no liability to the plaintiff.

The other question is of a somewhat different character, for it cannot be said that failure to construct proper and additional means of exit from a mill in case of fire in any way contributed to the occurrence of the fire itself. All that can be said is, that if they had been provided, some of the results that followed from the fire might have been lessened, alleviated, or prevented. And the narrow question is presented, whether a master is required by the common law so to construct the mill, or so to arrange the place where his servants work, that they shall be protected from the consequences of a casualty for which he is not responsible. We know of no principle of law by which a person is liable in an action of tort for mere nonfeasance by reason of his neglect to provide means to obviate or ameliorate the consequences of the act of God, or mere accident, or the negligence or misconduct of one for whose acts toward the party suffering he is not responsible. If such a liability could exist it would be difficult, if not impossible, to fix any limit to it. And we are therefore of opinion that it is no part of the duty of a master to his servant, employed in a building properly constructed for the ordinary business carried on within it, in the absence of a statute requirement, to provide means of escape from it, or to have remedial agencies at hand to alleviate the results, or to insure the safety of the servant from the consequence of a casualty to which his negligence does not directly contribute. The common law gives a remedy to a servant who is injured by the wrongful or negligent act of the master; the liability arises upon the doing of the act. But the common law goes no further; it does not provide a remedy when the master is not responsible for the act, on the ground that he has omitted to provide means to avoid its consequences. The master is not liable to the servant unless he has been negligent in something which he has contracted or undertaken with his servants to do, and he has not undertaken to protect him from the results of casualties not caused by him or beyond his control. See *Wilson v. Merry*, L. R., 1 H. L. Sc. 326.

It is no part of the contract of employment between master and servant so to construct the building or place where the servants work that all can escape in case of fire with safety, notwithstanding

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ing the panic and confusion attending such a catastrophe. No case has been cited where an employer has been held responsible for not providing such means of escape. The construction and arrangement of manufactories and places where large numbers of persons are employed may be proper subjects of legislative action, and such an act has been passed since this catastrophe. *Stats.* 1877, ch. 214.

We are of opinion that a verdict for the plaintiff on these facts could not be sustained, and by the terms of the report the entry must be

Plaintiff nonsuit.

KEITH V. GRANITE MILLS.

(126 Mass. 90.)

Master and servant — negligence — duty of master as to safety of building.

In an action by the administrator of an employee injured in escaping from defendant's burning mill, the court charged that if the room where the plaintiff worked was suitable, and there were proper means of extinguishing fires, and the means of egress and escape were suitable and proper, and in order and ready for use, there could be no recovery, and refused to charge that it was the defendant's duty to provide means of giving alarm in case of fire. *Held*, no error.

ACTION like the last, growing out of the same fire. The opinion sufficiently states the case. The defendant had judgment.

B. F. Butler (E. L. Barney with him), for plaintiff.

T. M. Stetson, for defendant.

ENDICOTT, J. We find no reason for sustaining the exceptions in this case. The rules of law applicable to it were stated in *Jones v. Granite Mills, ante*, 84. In both cases the injuries for which damages are sought to be recovered are of a similar character, and were occasioned by the same casualty. In the present case it was not contended that the fire was caused originally by the defendant.

The case was submitted to the jury; and the plaintiff requested the court to instruct them, first, that it was the duty of the defend-

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ant to provide proper and suitable means of extinguishing fire; second, proper and suitable ways and means of escape; and third, of giving alarm or notice to its servants in case of fire.

On the two first requests the court gave this instruction, in substance, that if the room was a suitable place, and there were proper and suitable means of extinguishing fire, and the means of egress and escape were suitable and proper, and in order and ready for use, then the plaintiff could not recover. This instruction, as applied to the first request, was sufficiently favorable to the plaintiff. Even if it was the duty of the defendant, in a case like this, to provide proper means of extinguishing fire, and to have the same ready for use, the jury have found the duty to have been performed. Upon the second request, the instructions were also sufficiently favorable to the plaintiff. For the reasons stated in *Jones v. Granite Mills*, the presiding judge might properly have declined to submit that question to the jury; and his rulings on that branch of the case, including those relating to the infancy and want of capacity of the plaintiff's intestate, became immaterial, and it is unnecessary to consider them further. The third instruction requested was properly refused. It is no part of the master's duty to his servants to provide special means of notifying them of a fire or other casualty occurring on his premises. The duty here sought to be imposed upon the master is of the same kind as that of providing means of escape, and is to be governed by the same principles.

Exceptions overruled.

ALLING v. BOSTON & ALBANY RAILROAD COMPANY.

(126 Mass. 121.)

Carrier — of passengers — baggage — samples of merchandises.

The plaintiff's travelling salesman delivered to the defendant railroad company at Worcester a trunk belonging to the plaintiffs, and filled with samples of jewelry belonging to them, worth \$10,000, for transportation as his baggage to Hartford, for which place he purchased a ticket for himself. He did not inform defendant of the character or value of the contents of the trunk. The trunk was of ordinary size and shape, but weighed 135 pounds, and was visibly bound on the outside with heavy iron braces, clamps and hinges. On the arrival of the train at Hartford the trunk was not delivered to the agent,

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but a bag had been fraudulently substituted by a change of checks, and the trunk was carried to New York and there delivered to one who presented the check for it, and was afterward found there broken open and robbed of its contents. *Held*, (1) that the defendant was not liable to plaintiffs in contract, for the only contract was to carry the personal baggage of the agent, and (2) was not liable in tort in the absence of gross negligence.

ACTION to recover the value of a trunk and its contents, delivered to defendant railroad company for carriage. The plaintiff's travelling salesman delivered the trunk to defendant at Worcester for transportation as baggage to Hartford, at the same time purchasing a ticket for himself for the latter place. The trunk and its contents, samples of jewelry, worth \$10,000, belonged to the plaintiffs. The agent did not disclose to the defendant the character or value of the contents. The trunk was of ordinary size and shape, but weighed 135 pounds, and was visibly heavily iron-bound with hinges, braces and clamps. On the arrival of the train at Hartford a bag was delivered to the agent instead of the trunk, and the trunk was carried to New York and there delivered to the holder of the check which appeared upon it, and was afterward found at New York broken open and robbed of its contents. The evidence showed that the robbery was effected by a fraudulent change of checks. The case was reserved for the full court.

G. F. Hoar and *T. L. Nelson*, for plaintiffs. The baggage-master had authority to bind the defendant by his acceptance for transport of valuable merchandise. The carrier who, without fraud practiced upon him, accepts in the course of his business valuable merchandise for transport, without inquiry as to its value, is liable for failure to keep it safely and deliver it. This is especially true where he so accepts it under circumstances from which his knowledge of its character may be inferred. *Pemberton Co. v. New York Central Railroad*, 104 Mass. 144; *Michigan Central Railroad v. Carrow*, 73 Ill. 348; s. c., 24 Am. Rep. 248; *Belfast & Ballymena Railway v. Keys*, 9 H. L. Cas. 556; *Great Northern Railway v. Shepherd*, 8 Exch. 30; *Macrow v. Great Western Railway*, L. R., 6 Q. B. 612; *Ellis v. Turner*, 8 T. R. 531; *Garnett v. Willan*, 5 B. & Ald. 53; *Martin v. Great Indian Peninsular Railway*, L. R., 3 Ex. 9; *Sleat v. Fagg*, 5 B. & Ald. 342; *Batson v. Donovan*, 4 id. 21; *Bodenham v. Bennett*, 4 Price, 31; *Brooks v. Pickwick*, 4 Bing. 218; *Davis v. Garrett*, 6 id. 716; *Wyld v. Pickford*, 8 M. & W. 443; *Duff v. Budd*, 3 Brod. & Bing. 177.

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F. P. Goulding, for defendant.

MORTON, J. This case cannot be distinguished from *Stimson v. Connecticut River Railroad*, 98 Mass. 83. The only contract which the defendant had entered into in relation to the property which is the subject of this suit was a contract with Kerr, the plaintiffs' agent. This was a personal contract with Kerr for the safe transportation of himself and his personal baggage over the railroad. There was no evidence whatever of any contract by which the defendant agreed to receive and transport Kerr's trunk as merchandise.

Upon the contract implied by the sale of a ticket to Kerr the plaintiffs can maintain no action, and Kerr could not recover for the loss of the jewelry contained in his trunk. *Jordan v. Fall River Railroad*, 5 Cush. 69; *Collins v. Boston & Maine Railroad*, 10 id. 506.

There was no evidence which would justify a verdict for the plaintiffs upon the counts in tort. It appeared at the trial that Kerr bought of the defendant, in Boston, a ticket for New York by way of Worcester and Springfield. He stopped over a train at Worcester. In the afternoon he delivered the trunk to the baggage-master of the defendant at the station in Worcester, asking him to check the trunk through to Hartford. He gave no notice that it contained valuable property other than personal baggage, and did not ask the defendant's agent to receive and transport it as merchandise. The agent received and checked it, in the usual course of business, as the baggage of a passenger.

The defendant thus received it under the contract implied in the sale of a ticket that it would safely transport the passenger and his proper personal baggage. The plaintiffs contend that the jury might find that the defendant's agent knew from the appearance of the trunk that it was the trunk of a person "known as a commercial traveller," and contained merchandise. There was no evidence that he knew this. The most that the evidence shows is that he may have suspected from the appearance of the trunk that it contained merchandise other than baggage. But this fact would not affect the rights of the parties. Kerr offered and delivered the trunk as his personal baggage; he thus represented by implication that it contained no property not included within that class or description.

The carrier was justified in receiving the trunk as baggage, under this representation, although he doubted its truth, and the only

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liability he would assume would be the liability which would attach if it were true. Under such circumstances, the carrier, if liable at all for property other than baggage thus put into his custody, with a fraudulent concealment of its character and value, is only liable for gross negligence or fraud, of which there is no evidence in this case. *Dunlap v. International Steamboat Co.*, 98 Mass. 371.

The plaintiffs offered to show "that a large part of the defendant's business consisted in transporting a large class of passengers known as commercial travellers, with trunks like this, containing merchandise of great value, and that these trunks are known as sample or merchandise trunks, and are of special construction, and in the course of that business the commercial travellers purchase tickets for the ordinary passenger trains and receive checks for their said trunks, and the defendant undertakes to transport the traveller and trunk accordingly for the price of the ticket." The court properly rejected this evidence. The same evidence in substance was offered and rejected in *Stimson v. Connecticut River Railroad*, above cited.

It would undoubtedly be competent for a railroad corporation to agree to transport, at its risk, merchandise by a passenger train for the price of the ticket sold to the passenger. And if the defendant had made such an agreement specially with Kerr, or if it had by notice or otherwise made a general agreement that commercial travellers might carry merchandise upon passenger trains at its risk, it might be liable in this action. But the offer of proof does not go far enough to show such an agreement.

The fact that commercial travellers or others are accustomed to carry merchandise in passenger trains without paying any more than the usual price of a ticket for a passenger, even if known to the carriers, will not render them liable for such merchandise. The travellers carry such merchandise at their own risk. The established rule of law which limits the responsibility of the carrier, upon the contract implied by the sale of a ticket to a passenger, to the proper personal baggage of such passenger, cannot be annulled, and the liability of the carrier enlarged, without proof of an agreement to that effect entered into by the carrier.

For these reasons, we are of opinion that upon the evidence in this case, the jury would not be justified in finding the defendant liable either in contract or tort.

Plaintiffs nonsuit.

Peters v. Siders.

PETERS V. SIDERS

(128 Mass. 135.)

Will — when deemed revoked by subsequent birth.

A statute provided that children of a testator, when born subsequently to the making of the will, and not provided for therein, should take as if there were no will, unless the omission to provide was intentional, and not occasioned by accident or mistake. A testatrix by ante-nuptial agreement had reserved to her sole use certain real estate and the right to dispose of it by will. Nine months after marriage she willed all her estate to her husband, making no provision for her children subsequently to be born. One month later she bore a child. *Held*, that the evidence justified a finding that the omission was intentional and not occasioned by mistake or accident.

WRIT of entry for lands. The opinion sufficiently states the facts. Case reserved.

J. R. Churchill, for demandant, cited *Ramsdill v. Wentworth*, 106 Mass. 820 ; s. c., 101 id. 125 ; *Bancroft v. Ives*, 3 Gray, 367 ; *Tucker v. Boston*, 18 Pick. 162, and distinguished *Buckley v. Gerard*, 123 Mass. 8.

A. French (*E. Ames* with him), for the tenant.

COLT, J. The mother of the demandant, who died July 21, 1849, executed her will April 30 of the same year, by which she gave all the real and personal property of which she might die possessed to her husband. Before her marriage, she had executed an ante-nuptial contract by which she secured the demanded premises to her sole use and benefit, with the right to dispose of the same by will. The demandant, who was her sole heir at law, and the only issue of the marriage, was born within about one month after the will was executed, and there was an entire omission to provide for him therein.

The demandant contends that under the provisions of the Gen. Stats., ch. 92, § 25, he takes the same share of his mother's estate as he would have been entitled to if she had died intestate. This depends on whether the omission was intentional, and not occasioned by accident or mistake. That was the only question before the court.

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The case was tried by a justice of this court, without a jury, and he found as a fact, that the omission was intentional, and not occasioned by accident or mistake. In the opinion of the court, there was evidence sufficient to warrant his finding.

The omission may be shown to be intentional, either by the terms of the will, or by extrinsic parol evidence. *Wilson v. Fickett*, 6 Metc. 400. There is nothing in this will, except the fact of the omission, which indicates a purpose not to provide for her son. But the relation of the testatrix to the objects of her bounty and to the child for whom provision is omitted, as well as her intelligence, and the circumstances under which the will is made, are all proper matters for consideration. *Buckley v. Gerard*, 123 Mass. 8. The judge might well find that the fact that the testatrix was so soon to be delivered of her first child must have been in her mind when the will was made, and could not have been forgotten. There is no suggestion of any mistake of fact or law, or any ignorance on the part of the testatrix, or any oversight of the scribe, as the cause of the omission. The making of the will at that time warrants a presumption that it was made in anticipation of her confinement, and with a purpose that if the event should prove fatal, her property should go to him on whom would devolve the care and support of the child. *Ramsdill v. Wentworth*, 101 Mass. 125.

By the terms of the report, the entry must be

Judgment for the tenant.

ASHCROFT V. EASTERN RAILROAD COMPANY.

(128 Mass. 193.)

Deed — reservation — exception.

A deed to a railroad company contained this clause : " Reserving to myself the right of passing and repassing and repairing my aqueduct logs forever, through a culvert six feet wide, and rising in height to the superstructure of the railroad, to be built and kept in repair by said company." *Held*, to confer on the grantor a new right not previously vested in him, operative as a reservation and not as an exception, and vesting only an estate for life.

BILL in equity to compel the removal of obstructions from an aqueduct, and for an injunction. The bill alleged a grant by Lovejoy to defendant of a strip of land for its railway, reserving

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for the benefit of his adjoining land an easement in the land conveyed, namely, the right to receive water from a spring by aqueduct logs, through a culvert; that the plaintiff by *mesne* conveyances had become the owner of the adjoining land and the easement; that the plaintiff and his grantors had enjoyed the easement peaceably for more than twenty years; that the defendant had since filled up the culvert with stone and other obstructions, destroying the aqueduct and the use of the water, and greatly injuring the plaintiff, etc.

The defendant pleaded that the reservation in the deed of Lovejoy to the defendant, dated October 26, 1837, was as follows: "Reserving to myself the right of passing and repassing, and repairing my aqueduct logs forever, through a culvert six feet wide and rising in height to the superstructure of the railroad, to be built and kept in repair by said company; which culvert shall cross the railroad at right angles with the south-easterly line of John Alley, 3d's, land, seventy-four feet west of the north-easterly line of my land, measuring on the center of the railroad."

The question of the sufficiency of the plea was reserved for the determination of the full court.

J. P. Treadwell, for plaintiff.

R. Olney, for defendant.

MORTON, J. The plaintiff's right to maintain this suit depends upon the construction of the clause in the deed recited in the defendant's plea.

We are of opinion that this clause must operate as a reservation, or by way of implied grant. The operation of an exception in a deed is to retain in the grantor some portion of his former estate, which by the exception is taken out of or excluded from the grant; and whatever is thus excluded remains in him as of his former right or title, because it is not granted. A reservation or implied grant vests in the grantor in the deed some new right or interest not before existing in him. Shep. Touchst. 80; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290.

The clause we are considering does not merely reserve to Lovejoy a right of way and of maintaining aqueduct logs through the land granted. The privilege which the parties intended should vest in him was the right of passing and repassing and of main-

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taining his aqueduct logs through a culvert to be built and kept in repair by the grantee. The provision that the grantee shall build and keep in repair the culvert is an essential part of the grant, and clearly indicates that the intention of the parties was to confer upon the grantor a new right not previously vested in him, and which, therefore, could not be the subject of an exception.

It is well settled, that generally the same rules of construction apply to a reservation or implied grant as to an express grant. In this case, the words used were "reserving to myself the right of passing and repassing, and repairing my aqueduct logs forever through a culvert." This gave only an estate for life to Lovejoy. To create an estate of inheritance by deed to an individual, the land must be conveyed to the grantee and his heirs, and these necessary words of limitation cannot be supplied by other words of perpetuity. As stated by WILDE, J., in *Curtis v. Gardner*, 13 Metc. 457, "a grant to a man to have and to hold to him forever, or to have and to hold to him and to his assigns forever, will convey only an estate for life." See, also, *Dennis v. Wilson*, 107 Mass. 591.

[Omitting minor matters.]

Bill dismissed.

COMMONWEALTH v. ROBINSON.

(126 Mass. 259.)

Criminal law — bar — indictment covering part of former period.

An acquittal on a complaint for keeping a tenement for the illegal keeping and illegal sale of intoxicating liquors, from January 1 to May 28, is a bar to a complaint for the like offense from January 1 to August 20 of the same year, as the same evidence, which would have warranted a conviction on the first, would warrant a conviction on the second complaint.

CONVICTION of keeping and maintaining a tenement for the illegal sale of intoxicating liquors. The opinion states the case.

J. L. Eldridge, for defendant.

C. R. Train, attorney-general, for the Commonwealth.

LORD, J. The bill of exceptions in this case presents some questions of certainly unusual, if not entirely novel character.

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The complaint made to a District Court charges the defendant with keeping a tenement used for the illegal sale and illegal keeping for sale of intoxicating liquors at Braintree, on January 1, 1878, and on divers other days and times between that day and August 20, 1878.

The bill of exceptions states that "in the Superior Court, the case being called for trial, the defendant having duly filed a plea in bar alleging a former acquittal of the same offense, and issue having been joined thereon, the government demurring *ore tenus*, it appeared and was admitted that the defendant upon June 19, 1878, was acquitted upon a complaint in said District Court charging him with keeping and maintaining a tenement for the illegal sale and illegal keeping for sale of intoxicating liquors on January 1, 1878, and to May 28, 1878; that the tenement alleged in that complaint was the same as that alleged in the complaint upon trial. The court thereupon sustained the demurrer between June 1, 1878, and August 20, 1878, and the defendant duly excepted thereto."

From this record, it is difficult to understand the precise condition of the case. Literally construed, it would seem as if a demurrer to a plea was sustained in part and overruled in part. We cannot suppose that the chief justice presiding intended to make such ruling, but rather that he intended to rule, as matter of law, that the plea was bad as to the time between June 1, 1878, and August 20, 1878, as not covering the whole offense charged in the complaint, and being thus bad as to a portion of the time covered by the complaint, it was wholly bad; and sustained the demurrer, intending to rule, as matter of law, that the defendant might so far avail himself of the facts stated in the plea as to preclude the government from offering proof of any facts transpiring before June 1, but to allow proof of facts subsequent to that date and prior to August 20, 1878.

Assuming this to be the true view of the facts affecting the rights of the defendant, the question is, was such ruling correct?

We are confirmed in our construction, by the fact that the defendant was directed to plead over, and all evidence of acts prior to June 1 was excluded. The real question thus presented is, whether the former acquittal is a bar to a conviction on the present complaint; and that question is to be decided by determining whether the offense charged in that complaint is the same offense with which he is charged in the complaint at bar. If it is the

same offense, it is a bar to the present complaint ; if it is not the same offense, it is neither a bar to this complaint nor is it admissible in evidence under it. An offense is in its nature indivisible. It may consist of a series of acts, but that series of acts constitutes but one offense. It may not only require a series of acts, but a duration of time, to constitute the offense ; but when the acts and the time are properly proved, the offense is single and indivisible. There is therefore no such thing known in law as a judgment of conviction or acquittal being a bar to part of an offense. It must be a bar to the whole, or it is of no value.

The offense charged in this complaint is that of keeping a tenement for the illegal sale of intoxicating liquors between the 1st day of January and the 20th day of August, 1878. If the defendant thus kept the tenement during every hour of the time between those dates, he has committed but one offense. It is true that such offense is continuous in its character. It is not an offense committed by a single sale of intoxicating liquors, but it is that of maintaining a common resort for the purchase of intoxicating liquors which the legislature has deemed it proper to declare to be a common nuisance. But it has been frequently held, that in order to constitute the offense, there need be no proof offered that the place was so kept on each day of the time during the interval alleged in the complaint ; but it is sufficient if during any portion of such time it was so kept ; and it would not be contended by any one that a conviction could be had of the same offense if the time were in the two complaints precisely the same ; nor would it be contended that a former conviction would not be a bar if the dates in the new complaint were both within the terminal dates of the former complaint.

It is however contended, that whenever the last complaint embraces a time which is not included in the previous complaint, evidence may be offered of acts done within such time, and a conviction had. The only case cited by the Commonwealth in support of such proposition is *Commonwealth v. Connors*, 116 Mass. 35, and cases there cited. The case, however, fails to sustain the proposition. It is decided upon the distinct ground that there is no one day common to both indictments, and *ENDICOTT, J.*, says : "Evidence that would have been competent on the one indictment would not have been competent on the other." No one of the cases referred to has any tendency to support the claim ; and so far as

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we are aware, the precise question is a new one in this Commonwealth.

The principles which govern it are, however, quite well settled. The question is fully discussed in *Marcy v. Commonwealth*, 108 Mass. 433, where the present chief justice of this court reviewed the whole subject, referring to the leading decisions bearing upon the question, and said : “ A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other.” In *Commonwealth v. Armstrong*, 7 Gray, 49, as well as in several other cases, it is decided that an indictment for being a common seller of intoxicating liquors from a day named to the day of finding the indictment is supported by proof of three sales made on any one day between the days named in the indictment. That case further decides, that although where the offense consists of but a single act, the day on which the act is alleged to have been committed is immaterial, if it appears to have been a day on which the offense charged might have been committed ; yet where, on the other hand, the offense charged is continuous in its nature, and requires a series of acts for its commission, the time within which the offense is alleged to have been committed is material, and must be proved as alleged ; so when a person is charged with an offense continuous in its nature and requiring for its commission a series of acts, and such offense is alleged to have been committed upon a single day, evidence of any facts tending to establish the offense at any other time than upon the day named is inadmissible.

Applying these principles to the case at bar, the same evidence which would have warranted a conviction upon the first complaint would have warranted a conviction upon the present complaint ; for upon the second complaint, the jury would have been required to convict the defendant if it should appear that he committed the acts complained of at any time between the 1st day of January and 1st day of June, 1878.

The plea, therefore, of former acquittal, if established, should have been a bar to this complaint. There are undoubtedly some practical objections to the application of this principle to a case like the present. Those difficulties, however, may readily be obviated by proper care on the part of the pleader. DEWEY, J., in

Commonwealth v. Traverse, 11 Allen, 260, remarks that "this form of stating the time, as allowed in this class of cases, gives to the prosecutor great latitude in the allegation of time, but having fixed it by the indictment, the government is bound by it." It therefore becomes important to the prosecutor, that in the exercise of this wide discretion, he should not so allege the time as that the exact facts which would establish the truth of his allegation would also establish the truth of the allegation in an indictment on which the defendant had been previously tried.

Although there are some difficulties in this view, they are by no means so great as they would be if we held differently. There is a seeming inconsistency in saying that a series of acts committed continuously from the 1st day of January to the 20th day of August is the identical series of acts committed between the 1st day of January and the 1st day of June of the same year ; but the inconsistency, when viewed in the light of the technical rules of pleading, is apparent rather than real. The offense is single and indivisible, and whether the time alleged is longer or shorter, the commission of the acts which constitute it, within any portion of the time alleged, is a bar to the conviction for any other acts committed within the same time. If there had been no previous complaint against this defendant, acts necessary to constitute the offense committed in January would have warranted a conviction which would have been a bar to a conviction of the same offense by other acts in July of the same year.

The test which is to be applied is not what facts were offered in evidence under the former complaint, but whether by the record the facts which might have been proved in the former complaint would necessarily establish the truth of the present complaint, and clearly the truth of the facts necessary to establish the truth of the former complaint would establish the truth of the present.

A more serious practical difficulty arises from the fact that substantially and really it is allowing an amendment to a complaint before an appellate tribunal, which has already been tried before a court of competent jurisdiction. If it should be said, that for the purpose of identifying the former offense, and of showing that the offense now charged is a different offense from the former by allowing proof only of acts committed after the trial of the former complaint, the reply is, that in law the offenses are identical, though the instruments of proof are different. If we reverse the

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order of the complaints, and in fact a party had been convicted upon the last complaint, it would clearly be absurd to say that it might be shown that in this complaint he had been convicted upon evidence of acts committed in July and August, and no evidence was offered of any acts committed during the time alleged in the first complaint. Or to apply another test, if these two appeals had been pending at the same time, and tried together before the same jury, could the defendant have been convicted upon both? Precisely the same evidence which would require the jury to convict him upon the first complaint would require them also to convict him upon the second. By the statute, the length of time during which the party is engaged in the business is not an element of the offense, and the identity of the offense can be determined by the discretion of the pleader.

In the case of *Commonwealth v. Connors*, 116 Mass. 35, there were two indictments, the first of which alleged the keeping of the tenement on July 1, 1872, and on divers other days and times between that day and May 1, 1873; and the second indictment alleged the keeping on May 1, 1873, and on other days between that day and June 12, 1873. It was objected in that case that two offenses were charged, when but one offense had been committed, because, by comparing the indictments, it appeared that the grand jury had, in the two indictments together, charged a continuous keeping of the same tenement upon every day from July 1, 1872, up to June 12, 1873, and that the offense, being continuous, could not be subdivided, and made to constitute two offenses, when in fact but one had been committed. This position, however, was decided to be untenable. Because there was no single day common to both indictments, it was held that two distinct offenses were charged; thus illustrating the very large discretion vested in the grand jury in limiting the time within which a series of acts may be alleged as constituting a single offense. Other practical difficulties may readily be suggested in the way of holding that precisely the same acts, under allegations which call for no other acts, constitute different offenses, and are not the identical offense.

This case differs widely from those cases so fully commented upon in *Morey v. Commonwealth*, cited above, in which the same acts done at the same time may constitute both of two distinct offenses. As a sale of liquor without authority upon the Lord's Day is an offense against the law regulating the sale of intoxicating liquors, so it may be

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also another and distinct offense of violation of the Lord's Day ; and although it has been held that though the same acts, thus committed at the same time, may constitute two distinct offenses, and the party may be convicted of both offenses, yet the complaints must be different, must contain different allegations and charge different offenses. In the case at bar, the offense charged in the two complaints is the same, and the evidence which would sustain the first complaint would necessarily support the second.

On the whole, therefore, upon the question of law which, without criticising the form, the parties intended to present, namely, whether an acquittal on a complaint charging the defendant with maintaining a nuisance from January 1 to May 28, 1878, is a bar to another complaint for maintaining the same nuisance from January 1 to August 20, 1878, we are of opinion that such an acquittal properly pleaded and duly established is a bar.

Exceptions sustained.

FARRINGTON V. KIMBALL.

(126 Mass. 312.)

Landlord and tenant — when assignor of lease may recover rent.

A lessee can recover rent from an assignee of the lease only when he himself has paid the rent to the lessor.

ACTION for use and occupation of a store. Hunneman leased the store to the plaintiff, reserving rent; the plaintiff assigned the lease, and the defendant was the assignee in bankruptcy of a sub-assignee. The action was for the rent from April 27 to Sept. 27, 1876. The plaintiff had paid Hunneman the rent only, for March, April and May, 1876. Hunneman had never released the plaintiff, nor assented to any of the assignments, nor recognized the defendant nor claimed rent from him. The plaintiff had judgment for the amount claimed.

D. F. Kimball, pro se.

J. P. Farley, Jr., for plaintiff.

ENDICOTT, J. When a lessee assigns his entire interest in the estate, he is still liable to the lessor on his covenants to pay rent ;

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and the assignee is also liable to the lessor for the performance of all the covenants which run with the land by virtue of the privity of estate created by the assignment. *Wall v. Hinds*, 4 Gray, 256; *Blaks v. Sanderson*, 1 id. 332; *Sanders v. Partridge*, 108 Mass. 556. Both are liable, and the lessor has the option to sue either. When the lessee is obliged to pay, by reason of his covenants to pay rent, the question arises, what are his rights against the assignee who has not performed his duty, but has taken the whole benefit of the lease.

It was said in general terms by Chief Justice SHAW in *Patten v. Deshon*, 1 Gray, 325, 330, that "the first lessee, notwithstanding the assignment, remains liable for the rent, in virtue of his express covenants if the lessor elects so to hold him, in which case he will be entitled to the rent from the assignees." The leading case in England is *Burnett v. Lynch*, 5 B. & C. 589, where it was held that a lessee, who had assigned the lease by a deed poll, and had been compelled to pay damages to the lessor for breach of the covenants of the lease while his assignee was in occupation, could maintain an action against the assignee for having neglected to perform the covenants whereby the lessee suffered damage. Lord DENMAN, in commenting on this case, when delivering the judgment of the Exchequer Chamber in *Wolveridge v. Steward*, 1 Cr. & M. 644, 660, stated that "the effect of the assignment is, that the lessee becomes a surety to the lessor for the assignee, who, as between himself and the lessor, is the principal, bound, whilst he is assignee, to pay the rent and perform the covenant running with the estate; and the surety, after paying the debt, or discharging the obligation to which he is liable, has his remedy over against the principal. And he would also, in all probability, have the same remedy over against each subsequent assignee, in respect of breaches committed during the continuance of the interest of each, for the lessee is, in effect, a surety for each of them to the lessor." And Baron PARKE, who took part in that judgment, afterward, in *Humble v. Langston*, 7 M. & W. 517, 530, also expressed the opinion that the lessee was liable in the nature of a surety, as between himself and the assignee, for the performance of the covenants of the lease.

In *Moule v. Garrett*, L. R., 5 Ex. 132, the assignee, for whose breach of the covenants of the lease the lessee was obliged to pay, did not take directly from the lessee, but was second assignee, and the question suggested by Lord DENMAN arose as it does in the

case at bar. It was held that there was an implied promise on the part of each successive assignee of a lease to indemnify the original lessee against breaches of covenant in the lease committed by each assignee during the continuance of his own term. The decision was afterward affirmed in the Exchequer Chamber. L. R., 7 Ex. 101. Chief Justice COCKBURN, while conceding that the defendants might be held on the ground of the implied contract, was of opinion that the liability of the assignee might be put on another and preferable ground, namely, that when one person is compelled to pay damages for the legal default of another, he is entitled to recover from the person by whose default the damage was occasioned the money so paid, and that it was a matter of indifference whether the liability rested on an implied contract or on an obligation imposed by law; it was a duty the law enforces. Mr. Justice WILLES stated his concurrence in this concise language: "I am of the same opinion, on the ground that where a party is liable at law by immediate privity of contract, which contract also confers a benefit, and the obligation of the contract is common to him and to the defendant, but the whole benefit of the contract is taken by the defendant, the former is entitled to be indemnified by the latter in respect of the performance of the obligation."

Assuming, therefore, that a lessee may maintain an action against an assignee on either of the grounds suggested in these cases, it is very clear that he can only do so after he has paid the lessor for breach of the covenants of the lease by the assignee. If he is a surety, then he must pay the debt for which he is liable before he can recover of the principal. *Hoyt v. Wilkinson*, 10 Pick. 31. If it is a debt imposed upon him by the default or act of the assignee, it must of course be discharged before the liability of the assignee accrues. The ruling, therefore, of the presiding judge, which allowed the plaintiff to recover for monthly installments of rent which he had not paid, was erroneous. No question of pleading was raised.

Exceptions sustained.

Hastings v. Stetson.

HASTINGS V. STETSON.

(126 Mass. 389.)

Slander — unauthorized repetition by third persons.

One who utters a slander is not responsible for its voluntary and unjustifiable repetition by others, over whom he has no control, and without his authority or request.

ACTION for slander. There was evidence of repetitions of the slanderous words by those who heard them. The opinion states the other facts. The plaintiff had judgment below.

H. H. Bond, for defendant.

G. M. Stearns, for plaintiff.

GRAY, J. It is too well settled, to be now questioned, that one who utters a slander is not responsible, either as on a distinct cause of action or by way of aggravation of damages of the original slander, for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control, and who thereby make themselves liable to the person slandered; and, that such repetition cannot be considered in law a necessary natural or probable consequence of the original slander. *Ward v. Weeks*, 4 M. & P. 796; s. c., 7 Bing. 211; *Tunncliffe v. Moss*, 3 Car. & K. 83; *Barnett v. Allen*, 1 F. & F. 125; *Dixon v. Smith*, 5 H. & N. 450; *Parkins v. Scott*, 1 H. & C. 153; *Derry v. Handley*, 16 L. T. (N. S.) 263; *Stevens v. Hartwell*, 11 Metc. 542, 550; *Terwilliger v. Wands*, 17 N. Y. 54.

In the present case, there was no evidence that the defendant, in any form of words, asked or authorized any one to repeat his statements, or that those who did repeat them held any relation to him that would imply such authority, or had any legal justification for the repetition. The presiding judge, though expressly requested to rule that no damages could be recovered by the plaintiff on account of the repetition by third persons of statements made by the defendant, declined so to do and, in the instructions given, allowed the jury to hold the defendant responsible for repetitions by such persons, and for which they would themselves be liable to the plaintiff. For this reason the

Exceptions must be sustained.

Snow v. Sheldon.

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(126 Mass. 333.,

Marriage — married woman's separate business — farming.

A married woman, owning and carrying on a farm for the support of her family or her husband's family, is engaged in a "business on her separate account," within the meaning of a statute, requiring her to file a certificate that personal property used in her separate business is owned by her, in order to exempt it from attachment against her husband.

REPLEVIN of farming implements. The implements were upon and used in the cultivation of a farm owned by the plaintiff, upon which she and her husband lived, and which she carried on for her own benefit, her husband assisting in the management. The farm originally belonged to the husband, and was conveyed by him to the wife, without valuable consideration. Some of the implements had been purchased and paid for by the wife, while others she had paid nothing for. The husband sold them all to the vendee of the defendant. The opinion states other facts. The plaintiff had a verdict.

H. H. Bond, for defendant.

C. Delano, for plaintiff.

AMES, J. It appears from the bill of exceptions that the farm, containing about one hundred and sixty acres, was carried on under the management, and generally by the personal labor, of the plaintiff's husband. A number of cows and other animals was kept on the place. Additional laborers were employed to assist in the planting, haymaking and harvesting seasons. The management generally was such as is usual in farms in that part of the country. It does not appear that the husband had any other occupation, but in all that he did upon the place he was acting as the plaintiff's agent. The farm itself belonged to her, and she claims to be the owner of the animals kept on the place, of the produce of the farm, and of all the tools, implements, and personal property of every kind used in carrying it on. She furnished the pay for the help employed, and for all such articles as were purchased to be used

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upon the place. And whatever money was obtained from the sale of any of the produce was paid to her. She distinctly contends that the whole of the business was on her separate account.

The only question is whether this business comes within the meaning of the statute of 1862, ch. 198, § 1, which requires that a married woman doing business on her separate account, in order to protect her property employed in such business from liability to be attached for her husband's debts, must file with the town clerk the certificate prescribed by that statute. The object of the statute was to afford the means of ascertaining in which of the two persons, apparently in the possession and use of property in carrying on any kind of trade or occupation, the title is vested. So that all, having occasion to transact business with either, may regulate their dealings accordingly. BIGELOW, C. J., in *Chapman v. Briggs*, 11 Allen, 546. It has been decided that this provision of the statute applies to personal property only. *Bancroft v. Curtis*, 108 Mass. 47. The certificate should set forth the name of the husband, the nature of the business proposed to be done, and the place where it is to be done, "giving the street and number of the place of business if practicable." We do not understand that this statute is to be restricted in its application to cases in which a married woman goes into business as a trader in the ordinary sense of the word, or manufactures goods for sale, or keeps a boarding-house, but that agriculture may be one of those occupations in which she may do business on her separate account within the meaning of the statute. If it is an occupation by which she supports herself and her family, and is carried on with her funds, and with implements and means belonging to her, it is immaterial that the produce is mainly consumed in her family, and that a small part of it only is raised to be sold.

The case of *Proper v. Cobb*, 104 Mass. 589, which is cited by the plaintiff, does not conflict with our view of the case at bar. There may be partial uses of land belonging to a married woman on so small and trivial a scale as not to come within the description of a separate business within the meaning of the statute, and cases might be imagined presenting some ambiguity in regard to its application. We go no farther on this occasion than to say, that where a married woman carries on a farm for the support of her family, or her husband's family, she is following a separate business, which requires the designated certificate for the protection of the personal

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property employed in it from liability to the husband's debts. *Chapman v. Foster*, 6 Allen, 136; *Feran v. Rudolphsen*, 106 Mass. 471.

As the jury were instructed to find for the plaintiff, on the ground that no certificate was necessary to protect the property from attachment by a creditor of her husband, a new trial must be ordered.

Exceptions sustained.

MORRISSEY V. EASTERN RAILROAD COMPANY.

(126 Mass. 377.)

Negligence — action for, by trespasser on railway.

Defendant's railway train ran over and injured a child four years of age, walking on its track. The place in question was a cutting through a ledge, near which the plaintiff lived with his mother. There were houses on both sides of the track upon the ledge and beyond it, and the cutting was unfenced at both ends. The cutting was 400 feet from any public street, but people were accustomed to pass through it. *Held*, that the plaintiff was a trespasser, and could not maintain an action for the injury, there being no evidence of malice or gross and reckless carelessness. (*See note, p. 687.*)

ACTION for injury sustained by the plaintiff in being run over by defendant's railroad train. The plaintiff at the time of the accident was four years old, and was playing upon the track, in a cutting through a ledge, near the house where he lived with his mother. There were houses on the ledge on both sides of the track, and beyond the track, and the cutting was unfenced at both ends. The cutting was 400 feet from any public street, but people were accustomed to pass through it. The mother had been watching the boy at play near the house; that he was in the habit of running to the track; that she let him out of her sight a minute, and he ran on the track. The engineer was at his post, and saw nothing of the child. The whistle and bell were usually sounded near that point, and he supposed they were sounded on this occasion; but there was also testimony that they were not sounded. The defendant had a verdict.

C. A. Benjamin, for plaintiff.

S. Lincoln, Jr., for defendant, was not called upon.

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AMES, J. The plaintiff at the time of the accident was a mere intruder and trespasser upon the railroad track. No inducement or implied invitation to him to enter upon it had been held out. He was neither a passenger nor on his way to become one, but was there merely for his own amusement, and was using a track as a playground. The defendant corporation owed him no duty, except the negative one not maliciously or with gross and reckless carelessness to run over him. *Johnson v. Boston & Maine Railroad*, 125 Mass. 75. Upon this question, and also upon the question whether the plaintiff's injuries had resulted from the tortious acts of the defendant, without contributory negligence on the part of the plaintiff or of those who had him in charge, the case was submitted to the jury with instructions of which no complaint is made on his behalf. The verdict was for the defendant, and we do not think that any other verdict could have been authorized by the evidence. Therefore, by the terms of the report, there must be

Judgment on the verdict.

NOTE BY THE REPORTER.— See *Gramlich v. Wurst*, 86 Penn. St. 74; s. c., 27 Am. Rep. 184; *McAlpin v. Powell*, 70 N. Y. 126; s. c., 26 Am. Rep. 553, and note, 563; *St. Louis, etc., R. R. Co. v. Bell*, 81 Ill. 76; s. c., 25 Am. Rep. 269; *Keeffe v. Milwaukee and St. Paul R. R. Co.*, 21 Minn. 207; s. c., 18 Am. Rep. 393; *Gray v. Scott*, 66 Penn. St. 345; s. c., 5 Am. Rep. 371; *Severy v. Nickerson*, 120 Mass. 306; s. c., 21 Am. Rep. 514; *Illinois Cent. R. R. Co. v. Godfrey*, 71 Ill. 500; s. c., 23 Am. Rep. 112; *Nicholson v. Erie Railway Co.*, 41 N. Y. 525.

In *Johnson v. Boston & Maine Railroad*, 125 Mass. 75, cited in the principal case, it was held that if a person buys a ticket which entitles him to a passage over a railroad from A. to C., and stops at B., intending to resume his journey to C. the same day, leaves the station at B., and afterward, while on his way to the station of another railroad corporation near by, for the purpose of meeting his son, returns to the station which he had left, and is injured while crossing the tracks, through the negligence of the railroad corporation which had sold him the ticket, when he might have crossed the railroad at a highway crossing, he is a trespasser, and cannot, in the absence of evidence that the negligence was willful, maintain an action for the injury, although the defendant's platforms extend between two highways crossing the track, and people have been accustomed to pass from the station on one railroad to that on the other at that point without objection by the corporation, and although his ticket does not forbid stopping over at B.

In *Nicholson v. Erie Ry. Co.*, 41 N. Y. 525, the plaintiff's intestate was run over and killed by defendant's cars while he was crossing the track on their premises, not at a public crossing, but where persons had been accustomed to cross without objection. It was held that no action could be maintained. The court said, by E. DARWIN SMITH, J.:

"No relation existed between the defendant and Nicholson to create any particular duty, such as exists between a master and servant, or employer and his employee. The complaint alleged that the said James Nicholson was travelling upon a public highway and lawfully crossing the defendant's track. If the fact had been so the defendant and Nicholson would have stood upon common ground, and could have had equal rights in such highway, and the defendant would have owed to him a clear legal duty; but the case seems to me to be without the first element to create a legal duty on the part of the defendants to set or secure their cars in respect to the rights of said Nicholson. He was not in their employ. He was not in the employ of the iron company. He had no lawful business at the time on their track; no legal right to use or cross it, and would have been simply ex-

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enced from liability as a trespasser on the naked ground of a license, implied from previous use without objection.

"The case is within the principle, I think, asserted in *Hounsell v. Smyth*, 97 Eng. Com. Law, 731.

"In that case the question arose upon demurrer. The complaint alleged that the defendant had a certain quarry which had long been open and worked for getting out stone, and which was situated upon certain waste land which was considered open to the public; and that all persons having occasion to come upon or over said waste land had been used and accustomed to go upon, along and across the same without interruption or hindrance from and with the license and permission of the owners thereof; that said quarry was between two highways, and that the defendant left the same unfenced and took no care to guard it, and that plaintiff, having occasion to pass over said waste land in a dark night, fell into said quarry and was injured.

"The court sustained the demurrer, holding that the defendant owed no duty to the plaintiff. In respect to that part of the complaint where it was alleged that all persons having occasion to cross or pass over the said waste land, have been used and accustomed to go upon, along and across the same without interruption or hindrance from, and with the license and permission of the owners of such waste land, the learned judge said: 'No right is alleged. It is merely stated that the owners allowed all persons who chose to do so, for recreation or for business, to go upon the waste without complaint; that they were not churlish enough to interfere with any person who went there. One who thus uses the waste has no right to complain of any excavation he finds there. He must take the permission with its concomitant conditions, and it may be perils.'

"That is precisely this case. All who pleased were permitted to cross the open common waste ground adjacent to the defendant's track, and the track itself, without hindrance; but it was at their own risk and peril. The defendant undertook or assumed no duty in respect to such persons. As was said in the above cited case, 'all that can be said is, that the plaintiff had a tacit permission to cross the track.'"

EARL, C. J., said: "At the time the intestate was killed he was passing over the branch track upon defendant's land. It cannot be doubted from the evidence that he had an implied license to cross at that point, and hence that he was lawfully there. He was not there by invitation of the defendant, nor in the business of the defendant, but for his own purpose on his way home. While he was lawfully there, he had no right as against the defendant to be there. It could at any time have revoked the license, and then he could not have crossed at that point without being a trespasser.

"The cars were lawfully upon the branch track, and the defendant had the right to have them there. The defendant owed the intestate no active duty. It owed him no duty whatever, except such as every citizen owes another. It had no right intentionally to injure him, and would be liable if it heedlessly or carelessly injured him while performing its own business. It owed him a duty to abstain from injuring him either intentionally or carelessly, but it did not owe him the duty of active vigilance to see that he was not injured while upon its land merely by permission for his own convenience. If the point where the intestate was killed had been a public highway, or if at the time he had been a passenger in a car upon the main track, and he had been injured by collision with the cars coming down the branch track, or if in any other way he had been not only lawfully, but in the exercise of a right at that point, the defendant would have owed him a duty to see that the cars upon the branch track were properly secured, but as it was they owed him no duty and cannot be charged, as to him, with negligence in not blocking or fastening the cars. In reaching this conclusion, I think I am sustained both by principle and authority."

LOTT, J., said: "It is true that the evidence tended to show that there was danger of the cars, left unfastened, being moved by winds in that locality, and that it was a proper precautionary measure to block the cars or fasten them in some other way to prevent such movement. I however do not find any facts in this case to justify the conclusion that the defendant by the omission of that precaution failed in the performance of any duty to the deceased. There was not any subsisting relation between the parties that imposed it.

"Assuming that the deceased, in consequence of the previous acquiescence of the defendant in his passing over the track, could not be considered a trespasser, he had no right to impose or exact any condition or restraint as to the manner in which it should use

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his property. He was in the prosecution of his own business, and had no connection whatever with the defendant.

"A man by closing a gate in the fence separating his yard or inclosure from a highway may effectually prevent his horse from running over a person rightfully passing on the sidewalk in front of his premises, and it may be deemed prudent to do so; but his omission to do it cannot charge him with a negligence or breach of duty."

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(123 Mass. 435.)

*Payment—voluntary—when may be recovered back.**

A lease provided that the lessee should keep the premises repaired, except in case of fire, and in case the premises should be rendered unfit for tenancy by fire, there should be a just and proportionate abatement of the rent. The premises were rendered unfit for tenancy by fire, but the lessor demanding the rent, the lessee paid it under protest. *Held*, that he could not recover it back.

ACTION on contract. The declaration alleged in substance that the defendant in writing leased to the plaintiff certain premises for the term of ten years; that by the terms of the lease the defendant was to pay the plaintiff a certain rent monthly, "except only in case of fire or other casualties," and to keep the premises in repair, "reasonable use and wear, and damage by accidental fire or other inevitable accidents only excepted;" "Provided, always, that in case the premises, or any part thereof, shall, during said term, be destroyed or damaged by fire, or other unavoidable casualty, so that the same shall be thereby rendered unfit for use and habitation, then, and in such case, the rent hereinafter reserved, or a just and proportionate part thereof, according to the nature and extent of the injury sustained, shall be suspended or abated until said premises shall have been put in proper condition for use and habitation by the said lessor, or these presents shall be thereby determined and ended at the election of the said lessor or his legal representatives." The declaration also alleged that the building on the premises was burned and injured by fire during the term, and rendered unfit for use and habitation, and was not put, by the lessor, in suitable condition and repair for occupancy, use and habitation for

*To the same effect, *Gibson v. Bingham* (43 Vt. 410), 5 Am. Rep. 269; *Town of Ligonier v. Ackerman* (46 Ind. 552), 15 Am. Rep. 281.

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the space of one year and longer ; and the defendant, though often requested, refused to do so ; that the lease was not determined and ended by the defendant ; that the defendant refused to abate and suspend said rent, or a just and proportionate part thereof, but exacted, and the plaintiff has been obliged by the defendant to pay, the rent in full, which the plaintiff did under protest, in order to save his estate and business ; and demanded judgment for a just and proportionate rebate.

The defendant demurred to the declaration and the court ordered judgment for the defendant.

P. A. Collins, for plaintiff.

E. W. Hutchins, for defendant.

LORD, J. In this case the demurrer was properly sustained. The plaintiff's declaration sets forth no cause of action which entitles him to recover. The amount which he seeks to reclaim was a sum which he voluntarily paid ; he paid it under no mistake of fact, and it has long been held that money so paid cannot be recovered back.

There is an early case (*Moses v. Macpherlan*, 1 W. Bl. 219), in which it was held that money paid, even under a judgment of a court of competent jurisdiction, could be recovered back, if in equity and good conscience the party receiving it was not entitled to hold it. In that case, the plaintiff had indorsed a promissory note, and at the time of the indorsement, it was agreed between himself and the indorsee that the latter should not look to him for payment, but should rely wholly upon the obligation of the maker. Suit, however, was brought against the indorser, and it was held by the court that the parol collateral agreement made at the time of the indorsement could not be given in evidence in bar of a suit upon the indorsement, and judgment was rendered against him, which judgment he satisfied. He then brought his action upon the parol agreement to recover the amount which he had thus paid contrary to such agreement, and it was decided that the action could be maintained. Lord MANSFIELD, in giving his opinion, says that the agreement was properly rejected in the former suit, and judgment properly rendered therein ; but that the parol agreement having been made, the party received payment of the note when in equity and good conscience he ought not to have received it, and that in the equitable

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action for money had and received, the plaintiff should be entitled to recover back the amount paid which equitably the plaintiff in the former suit had no right to demand.

That decision, however, was never deemed satisfactory; and although the courts for a long time struggled to sustain the principle upon which it was based, that money paid to a party, who in equity and good conscience ought not to hold it, might be recovered back, yet the decision itself has been regarded with approbation, and the limitation has come to be fixed that a party may in equity and good conscience continue to hold money voluntarily paid to him under no mistake of fact, and without fraud upon his part. This rule was established in *Brisbane v. Dacres*, 5 Taunt. 143, and from that time to the present that decision has been recognized and followed. It was distinctly recognized by Chief Justice SHAW in *Bacon v. Bacon*, 17 Pick. 134, and by the court in *Forbes v. Appleton*, 5 Cush. 115. And in *Benson v. Monroe*, 7 Cush. 125, 131, Mr. Justice METCALF says: "The court deem this a plain case. It is an established rule of law, that if a party, with a full knowledge of the facts, voluntarily pays a demand unjustly made on him, and attempted to be enforced by legal proceedings, he cannot recover back the money, as paid by compulsion, unless there be fraud in the party enforcing the claim, and a knowledge that the claim is unjust." Commencing with the case of *Brisbane v. Dacres*, before cited, he then proceeds to review the English authorities from that time forward in which the doctrine has been acted upon, and refers approvingly to the expression of Lord KENYON in *Brown v. M'Kinally*, 1 Esp. 279, that to allow such an action "would be to try every such question twice."

The fact that the plaintiff in this case might have been under embarrassment as to the amount of rent which he would withhold, or which he might properly claim to rebate, does not affect the principle. It was his right to litigate that question with his lessor, and his election to pay the full amount rather than to resist the payment of any portion of it makes the payment a voluntary one. It is not necessary to consider whether the plaintiff would have been entitled to a cross-action had the lease contained an express covenant to keep the premises in repair, for the lease contains no such covenant, and the law raises no implied promise to do so. The lease is in the form long used in this Commonwealth, which requires the lessee himself to keep the premises in such repair as he receives

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them (reasonable use and wear, and damage by accidental fire or other inevitable accident only excepted), with the right, commonly reserved in such leases, to have deducted from the rent a reasonable amount, if he is deprived of the use of the premises by such casualty.

Judgment affirmed.

LINNEHAN v. SAMPSON.

(126 Mass. 506.)

Negligence — dangerous animal in street — contributory negligence.

The plaintiff was injured by the defendant's bull while it was being led through a public street. The defendant was proved to have said after the accident that his servant was careless in his manner of leading the bull through the street. *Held*, that this evidence, together with the knowledge imputable to the defendant, of the dangerous nature of the animal in general, might be taken as an admission by the defendant that the bull needed to be controlled, and that the servant's care of it was negligent.

The plaintiff, while walking in a city street, heard cries for help, and on turning a corner saw a man on his back in the roadway, holding a bull by a rope attached to a ring in his nose, the bull attempting to gore him. The plaintiff went near the bull, but did not attempt to assist the man, and the bull rushed upon and gored the plaintiff. *Held*, that the plaintiff was not in this guilty of contributory negligence.

ACTION of damages for negligence. The plaintiff, while walking in a public street in a city, heard cries for help, and on turning a corner he saw a man on his back in the roadway, holding a bull by a rope attached to a ring in his nose, the bull attempting to gore him. The plaintiff went near the bull, but did not attempt to assist the man, and the bull rushed upon and gored the plaintiff. There was no special evidence that the bull was dangerous. There was evidence that the defendant, the owner of the bull, had after the accident said that his servant, the man who was leading the bull, was careless in leading the bull through the streets in that manner, and that he ought to have led him attached to a wagon and team, as he had done on a former occasion. There was also evidence that the bull was gentle and had always been easily controlled by a snap ring in his nose. That on this occasion the bull

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was excited by a red scarf worn by a girl in the street. The plaintiff had a verdict. The other facts appear in the opinion.

J. C. Sanborn. for defendant.

D. Saunders & C. G. Saunders, for plaintiff, were not called upon.

AMES, J. The instructions to the jury were sufficiently favorable to the defendant, and were all that the case required. It was ruled that, in order to recover in this action, the plaintiff must prove that the bull had such propensities, known to the defendant, as caused him to be a dangerous animal when led by one person only, in the day-time, upon the streets of a city, in the manner described in the evidence reported in the bill of exceptions; and also that it must be proved that, in thus leading the bull, the defendant's servant was negligent, in view of the propensities of the bull known to the defendant, or of the known, ordinary and usual disposition and propensities of such animals. It might well be that, previously to the injury, the defendant had had no trouble in managing the animal, and no knowledge of anything specially or peculiarly vicious in his habits or inclinations. But the jury may have believed that he knew, what is a matter of common knowledge, that a bull is an excitable and powerful animal, and that, if from any accidental or unexpected cause he should become excited while led or driven through a public street, he might be dangerous. *Hudson v. Roberts*, 6 Exch. 697. It is impossible to say, upon the evidence reported, that the jury would not be justified in finding that the knowledge, which by the ruling of the court was necessary to the maintenance of the action, was satisfactorily proved. There was testimony to the effect that the defendant had said that it was careless so to lead the bull through the streets, and that he ought to have been tied behind a wagon, as he had been once before. The jury, if they believed this evidence, might well have considered it as an admission that he knew that the animal needed to be kept under control, and also that he knew that the control which his servant had applied for the purpose of leading him through the streets was insufficient. In *Lyons v. Merrick*, 105 Mass. 71, it was held that the owner or keeper of animals of a vicious disposition or mischievous habits, of which the owner had previous actual or implied notice, is bound at his peril to keep them at all times and

in all places properly secured, and is responsible to any one who, without fault on his own part, is injured by them. The case of *Hewes v. McNamara*, 106 Mass. 281, is to the same effect. If the jury were satisfied that the defendant knew, or ought to have known, that the bull had dangerous propensities, it is unnecessary to prove that on any previous occasion he had actually endangered the life or limb of any person. *Worth v. Gilling*, L. R., 2 C. P. 1. There is certainly some evidence of a *scienter* in this case, and the question of its weight is not before us. *Applebee v. Percy*, L. R., 9 C. P. 647.

A question was raised at the trial as to contributory negligence on the part of the plaintiff; and it was contended that he was not in the exercise of reasonable care in approaching so near to the bull as he did; and that the calls of humanity would be no excuse. But the question whether the plaintiff's conduct on the occasion of the injury was wanting in reasonable prudence and caution, in view of all the circumstances, was submitted to the jury, as a question peculiarly for them to decide. They were to consider all the circumstances, and among other things, that the life of a fellow-creature was in extreme danger; but they must have understood that reasonable prudence and caution were elements in the case which the plaintiff must prove. It does not follow, as a matter of law, that in encountering the danger he was necessarily guilty of a want of due and reasonable care. The emergency was sudden, allowing but little time for deliberation. Some allowance might well be made for the confusion of the moment. *Buel v. New York Central Railroad*, 31 N. Y. 314. In *Eckert v. Long Island Railroad*, 43 N. Y. 502; s. c., 3 Am. Rep. 721, a case of the rescue of a child from being run over by an approaching train, the court say that "the law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons." The law does not require cowardice or absolute inaction in such a state of things. Neither does it require in such an emergency that the plaintiff should have acted with entire self-possession, or that he should have taken the wisest and most prudent course, with a view to his own self-preservation, that could have been taken. He certainly may take some risk upon himself, short of mere rashness and recklessness. *Mayo v. Boston & Maine Railroad*, 104 Mass. 137. The evidence reported does not con-

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clusively show a want of due care and prudence on his part, and it was therefore properly left to the jury. *Lane v. Atlantic Works*, 107 Mass. 104. What is ordinary care is usually to be settled by the judgment and experience of the jury, and not of the judge. *Gaynor v. Old Colony Railroad*, 100 Mass. 208.

Exceptions overruled.

MELLEN V. MORRILL.

(128 Mass. 545.)

Negligence — landlord and tenant — liability for injury to third person by condition of premises.

The lessor of a building is not liable to one who, in passing along a walk leading from the street to the building, for the purpose of transacting business with the tenant, is injured by falling down an unfenced adjoining embankment, although the premises were in that condition prior to the letting.*

ACTION of damages. The opinion states the case. Judgment was reserved.

J. E. Carpenter, for plaintiff.

A. B. Wentworth, for defendant.

MORTON, J. It appears that the plaintiff was injured by falling down an embankment adjoining a walk leading from the street to the door of a building owned by the defendant but leased to a tenant. The accident happened in the night-time. There was no defect in the walk itself. It was rendered dangerous, if at all, by the want of a railing, or by the absence of a light or some other warning. The plaintiff can hold the defendant liable only upon the ground that he was guilty of negligence toward her.

The occupier of a building, who negligently permits the building or the access to it to be in an unsafe condition, is liable for an injury occasioned thereby to a person whom he by an invitation, express or implied, induces to enter upon it. He is liable

*See note, 15 Am. Rep. 78; *Helwig v. Jordan* (58 Ind. 21), 21 Am. Rep. 129; *Burdick v. Oheadle* (28 Ohio St. 303), 20 Am. Rep. 733; *Shindelback v. Moon*, ante, p. 584.

because it is negligence in him to invite a person to enter upon a dangerous place without proper warning. *Sweeney v. Old Colony Railroad*, 10 Allen, 368; *Carleton v. Franconia Iron & Steel Co.*, 99 Mass. 216. But the defendant was not the occupier of the land, and did not expressly or impliedly invite the plaintiff to enter upon it. He had leased it to a tenant, and there is nothing to show that he retained any control over the walk, or any right to direct the purposes for which the premises should be used.

The fact that the walk was in the same condition before the demise is not material. The defendant did not guarantee that the premises should be safe for all the uses to which the tenant might put them. The tenant alone had the right to determine the purposes for which he would use the premises. If he used them so as impliedly to invite people to visit them in the night, it was his duty to make them safe by a railing, or by a light or other warning. It was not the duty of the landlord, and indeed he would not have the right, without the consent of the tenant, to do this.

We are of the opinion that upon the facts offered to be proved in this case, if any one is liable, it is the tenant, and not the defendant. *Leonard v. Storer*, 115 Mass. 86; s. c., 15 Am. Rep. 76.
Judgment for the defendants.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

KELLEY V. WHITNEY.

(43 Wis. 110.)

Negotiable paper—bona fides—taking after interest due—suspicious circumstances.

One who in good faith and for value purchases a promissory note before the principal is due, is within the protection of the law merchant, although interest is overdue and unpaid at the time of the purchase, and the note is indorsed by the payee without recourse, and there it appears to be "secured by real estate mortgage." (*See note, p. 701.*)

ACTION to foreclose a mortgage executed to secure a note. The plaintiff acquired them before the principal was due, but interest was overdue and unpaid. Other facts appear in the opinion. The defendants had judgment below.

Tracy & Bailey, for appellant.

L. J. Billings, for respondent. 1. Installments of interest being past due and unpaid when plaintiff purchased the note, he took it subject to all equities between the original parties, or between the mortgagor and Curtis. *Hart v. Stickney*, 41 Wis. 630 ; *Tay. Stats.*, ch. 126, § 1, subd. 6. Interest is as much a part of the debt as the

principal (1 Dan. on Neg. Insts., § 919 ; 2 Pars. on Notes and Bills, 894) ; failure to pay the interest at the time specified is a breach of the contract, and a distinct cause of action thereon (*Butler v. Wagner*, 35 Wis. 54 ; *Mills v. Jefferson*, 20 id. 50) ; and payment of the principal sum would be no bar to such cause of action. *Fake v. Eddy*, 15 Wend. 76 ; *Gordon v. Phelps*, 7 J. J. Marsh. 619. If the note is payable in installments, it is dishonored when the first installment is overdue and unpaid (*Field v. Tibbetts*, 57 Me. 358 ; *Vinton v. King*, 4 Allen, 562 ; *Fitchburg Ins. Co. v. Davis*, 121 Mass. 121) ; and for precisely the same reasons it is dishonored when installments of interest are overdue and unpaid. *Newell v. Gregg*, 51 Barb. 263 ; *First Nat. Bk. v. County Comm'rs*, 14 Minn. 77.

2. The indorsement by the payee and mortgagee, of the words "without recourse," though not sufficient in itself to charge the purchaser with notice, was yet a suspicious circumstance, which, with other circumstances, should have put him upon inquiry.

3. The words on the face of the note, "secured by real estate mortgage," were an integral part of the instrument (1 Am. L. C. [4th ed.] 311 ; *Shaw v. M. E. Society*, 8 Metc. 223 ; *Jones v. Fales*, 4 Mass. 245), and notified all comers of its incident, the mortgage ; and that the record of the satisfaction of the mortgage as to the hotel property was constructive notice to plaintiff of defendant *Goodenough's* rights, under the recording act. *Fallass v. Pierce*, 30 Wis. 443, 476 ; *Croft v. Bunster*, 9 id. 503-8.

COLE, J. Can the plaintiff, under the circumstances, claim the protection which the law affords a *bona fide* purchaser of commercial paper for value, before maturity? The learned Circuit Court, in obedience to the decision of this court in *Hart v. Stickney*, 41 Wis. 630 ; s. c., 22 Am. Rep. 728, decided that the plaintiff took the note and mortgage as dishonored and subject to equities, because installments of interest were due and unpaid when they were transferred. If there is error in this ruling of the court below — as we are well satisfied there is — it is an error for which this court, and not the Circuit Court, should be held responsible. When the case of *Hart v. Stickney* was decided, our attention was not called by counsel, and we entirely overlooked, in our examination, the previous case of *Boss v. Hewitt*, in the 15 Wis. 260, where a directly opposite ruling was made. The case of *Boss v. Hewitt* was decided in 1862, and the point was directly involved in the judgment. The defendant had given four negotiable notes payable respectively in

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one, two, three and four years, with interest payable annually, for the price of sheep bought of the payees, and secured all the notes by a mortgage. One of the notes, and an installment of interest on all of them, being due and unpaid, the payees transferred the notes and mortgage to the plaintiff, who brought an action to foreclose the mortgage. The defendant pleaded fraud on the part of the payees in the sale of the sheep. The court held that the fact that the first note was due and unpaid at the time of the transfer to the plaintiff did not let in the defense as against the notes not then due. On the other point, Mr. Justice PAINE, in delivering the opinion of the court, says: "Neither do we think that the fact that the interest had not been paid makes the case equivalent to a purchase after maturity, so as to let in defenses that might have been made against the original parties. The interest is a mere incident to the debt, and although it is frequently provided that it shall be paid at stated periods before the principal falls due, we know of no authorities holding that a failure to pay it dishonors the note, so as to let in all defenses against subsequent purchasers for value without any other notice of defects except the mere fact that such interest has not been paid. And we do not think it should have that effect. The maturity of the note, within the meaning of the commercial rule upon this subject, is the time when the principal becomes due." Pp. 262-3. *Boss v. Hewitt* derives direct support from the decisions in *National Bank of North America v. Kirby*, 108 Mass. 497, and *Cromwell v. County of Sac*, 96 U. S. 51. It is true, in *National Bank v. Kirby*, while it was held that failure to pay interest, standing alone, was not sufficient in law to throw such discredit upon the principal security upon which it is due, as to subject the holder, to the full extent of the security, to antecedent equities, yet it was also held that it was a fact proper to be considered by the jury, in connection with other circumstances, on the question whether the holder is entitled to the protection of one who has taken it in good faith and without actual or constructive notice of existing defenses. What is said in the opinion in *Hart v. Stickney* upon the point now in question was not necessarily involved in the decision, and must therefore be regarded as a mere dictum. The judgment in that case was reversed on the appeal of the plaintiff, the holder of the note, on the ground that the trial court refused proper, and gave erroneous, instructions as to the legal consequences resulting where a vendee

abandons possession of premises held by him under an executory contract of sale, and the vendor takes the possession. That was the precise point upon which the judgment was reversed. And as the earlier case of *Boss v. Hewitt* was entirely overlooked, which, by implication, is sustained by many decisions of this court, made in the farm-mortgage cases and in actions arising upon town, county and city bonds, we deem it our duty to adhere to the rule, that a purchaser for value of unmatured commercial paper, with interest overdue, is not, from that fact alone, affected with notice of prior equities or infirmities in the title.

The plaintiff being the purchaser of the note and mortgage for value before maturity, the further question arises, whether there were any circumstances or facts disclosed which can affect his rights as a *bona fide* holder. In considering this question it is necessary to bear in mind that it is the settled law in this State that a negotiable promissory note secured by mortgage may be transferred before maturity like other negotiable paper, and the holder takes it discharged of existing equities. The mortgage in such a case passes as an incident to the note, and may be enforced by the holder in spite of equities which may exist between the mortgagor and mortgagee. This is the doctrine laid down in *Craft v. Bunster*, 9 Wis. 504, and the same point has been repeatedly affirmed in subsequent cases. And, "As with other negotiable paper, mere suspicion that there may be a defect of title in its holder, or knowledge of circumstances which would excite suspicion as to his title in the mind of a prudent man, is not sufficient to impair the title of the purchaser. That result will only follow where there has been bad faith on his part." *Cromwell v. County of Sac, supra*. Was the plaintiff guilty of gross negligence, or had he any ground of suspicion of defect of title, or knowledge of circumstances which would excite suspicion on the part of a prudent man that there was some infirmity in these securities; and if so, what were those circumstances? The note, it is said, was indorsed by the payee and mortgagee "*without recourse*." But that "Is not sufficient to charge the assignee with notice of a defense against the note, on the part of the maker, nor is it sufficient to put him on inquiry in reference thereto." *Stevenson v. O'Neal*, 71 Ill. 314. Then it is said that the words "Secured by real-estate mortgage" appeared on the face of the note. But "The object and intent of the parties in putting these words on the note was not to limit or

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impair its value, but to add to it; * * * and they were neither sufficient to inform third parties of the contents or terms of the mortgage, nor to put them upon inquiry." *Howry v. Eppinger*, 34 Mich. 29-33. Again, it is claimed that there was on the records in the register's office a satisfaction or release of the note and mortgage in suit, executed by Curtis on the 16th day of July, 1874, so far as the mortgage was a lien on the south 45 feet of lot 30, known as the hotel property. But the plaintiff does not claim any thing inconsistent with that release, even if chargeable with actual knowledge of its existence.

But it is also said that while Curtis was the owner of plaintiff's note and mortgage, and when he executed this release, he knew of the existence of the second mortgage now held by the defendant *Goodenough* on a portion of the premises covered by the first. Suppose he did; it does not appear that when plaintiff bought the note and mortgage, he had knowledge of either the release or the second mortgage. The doctrine is well settled, "That equity will not permit a prior mortgagee, knowing that portions of the mortgaged premises have been subsequently conveyed or incumbered by the mortgagor, to deal with him arbitrarily, to the prejudice of the interests of such subsequent incumbrancers or purchasers, by releasing those parts of the land on which he has the only lien, and attempting to enforce his entire claim out of those portions in which such others had become interested." *Deuster v. McCamus*, 14 Wis. 308-311. But we do not see that this equitable principle has any application to this case, because the defendant *Goodenough* does not aver in his answer that he was injured in any way by the discharge of the prior mortgage as to a part of the premises contained in that mortgage; and the proof shows beyond a doubt that he was not prejudiced thereby. The property may be ample security, and it appears that it is, to discharge both mortgages. So, in any aspect of the case, we think the plaintiff is entitled to a judgment of foreclosure according to the prayer of his complaint.

BY THE COURT. The judgment of the Circuit Court is reversed and the cause remanded with directions to enter such a judgment.

RYAN, C. J., took no part.

Judgment reversed and cause remanded.

NOTE BY THE REPORTER.—This decision on the point of the purchase after default in payment of interest seems opposed to *National Bank v. Kirby*, 108 Mass. 497. The court there said:

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"If, as it is argued, it be true that the failure to pay interest ever as matter of law amounts to a dishonor of a note, it can only affect one who has knowledge of the fact. Payment of interest is not always indorsed, and other evidence is often relied on to prove it. Want of indorsement does not apprise the party, to whom such note is transferred, that there has been no payment; and when the note is only taken as collateral, and accuracy is not required in ascertaining the amount due for interest, the fact that overdue interest is not indorsed might have slight influence in putting the purchaser upon his inquiry. It has indeed been held by this court, that a note, the principal of which is payable by installments, is overdue when the first installment is overdue and unpaid, and is thereby subject to all equities between the original parties. *Vinton v. King*, 4 Allen, 582. Such a note is a single contract, and the party to whom it is transferred must take it with notice that, as to the overdue installment, the maker may have a justifiable cause for withholding payment, which may affect the whole contract. But in its effect upon the credit of a note, it is manifest that a failure to pay interest is not to be ranked with a failure to pay principal. Interest is an incident of the debt, and differs from it in many respects. It is not subject to protest and notice to indorsers, or days of grace according to the law merchant. Interest is not recovered on overdue interest; and the statute of limitation does not run against it until the principal is due. The holder of a note with interest payable annually loses no rights against the parties to it, whether makers or indorsers, by neglecting to demand it; and he has the election to do so, or wait and collect it all with the principal. In *Brooks v. Mitchell*, 9 M. & W. 15, it was held that a promissory note payable on demand cannot be treated as overdue so as to affect an indorser with equities merely because it is indorsed a number of years after its date, and no interest has been paid on it for several years before such transfer; and the same was held in *Bow v. Hewitt*, 15 Wis. 200. We are referred to no case in which it has been held that failure to pay interest, standing alone, is to be regarded sufficient in law to throw such discredit upon principal security upon which it is due, as to subject the holder to the full extent of the security, to antecedent equities.

There is a large class of negotiable securities, the principal of which is payable only at the end of many years, but with interest payable either annually or semi-annually; and many of the notes given in the purchase of real estate and secured by mortgage, especially in the country, are of this class, as are most of the obligations for debts contracted by public and many of those incurred by private corporations, and it is important that the value due to their negotiable character should not be impaired by new rules, tending to lessen their currency and credit. *Henry v. Flagg*, 13 Metc. 64; *Ferry v. Ferry*, 2 Cush. 92; *Sparhawk v. Willa*, 6 Gray. 163; *The City v. Lamson*, 9 Wall. 477.

But while non-payment of interest is not to be allowed the effect here claimed for it, it is still a fact proper to be considered by the jury, in connection with other circumstances, on the question whether the holder is entitled to the position of one who has taken in good faith and without actual or constructive notice of existing defenses."

The latter case was approved in *Cromwell v. County of Sac*, 96 U. S. 58, where it was held that overdue and unpaid coupons for interest, attached to a municipal bond, having several years to run, do not render the bond and coupons dishonored in the hands of a purchaser for value. The court said: "The interest stipulated was a mere incident of the debt. The holder of the bond had his option to insist upon its payment when due, or to allow it to run until the maturity of the bond; that is, until the principal was payable. Many causes may have existed for a failure to meet the interest as it matured entirely independent of the question of the validity of the bonds in their inception. The payment of previous installments of interest would seem to suggest that only causes of a temporary nature had prevented their continued payment. If no installment had been paid, and several were past due, there might have been greater reason for hesitation on the part of the purchaser to take the paper, and suspicions might have been excited that something was wrong in issuing it. All that we now decide is, that the simple fact that an installment of interest is overdue and unpaid, disconnected from other facts, is not sufficient to affect the position of one taking the bonds and subsequent coupons before their maturity for value as a bona fide purchaser. *National Bank of North America v. Kirby*, 108 Mass. 197. 74

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hold otherwise would throw discredit upon a large class of securities issued by municipal and private corporations, having years to run with interest payable annually or semi-annually. Temporary financial pressure, the falling off of expected revenues or income, and many other causes having no connection with the original validity of such instruments, have heretofore in many instances prevented a punctual payment of every installment of interest on them as it matured, and similar causes may be expected to prevent a punctual payment of interest in many instances hereafter."

On the other hand, the Supreme Court of New York, in *Newell v. Gregg*, 51 Barb. 263 hold that the non-payment of interest payable on a note annually is a dishonor of the note. The court say: "The payment of the interest annually was as much a part of the agreement as the promise to pay the principal. It was a portion of the debt. The entire debt was evidenced by one written promise to pay, and this promise was broken when Grant purchased the note. Was not such note dishonored? It so seems to me. Suppose the note had been payable in installments and one or more of the installments had been past due, could Grant have purchased the note and maintained his rights as a *bona fide* holder as to the installments not due against a defense which the maker could have made against the payee? I think not. It seems to me that when the instrument furnishes evidence that the written promise to pay has been broken, the party takes the note with a warning that the maker may have some defense. It is settled that where a note is payable by installments, or if the interest is payable periodically, an action may be brought for any installment or any interest as it becomes due. For the purpose of charging the indorser of a note payable in installments, there should be a demand of each installment as it becomes due, and a notice of non-payment. These authorities show that the note is dishonored, and the indorser, if the demand is not made and notice given, will be discharged as to such installments, but not as to future installments. The maker's liability will not be affected by the neglect to demand payment, etc., of the installment, but his neglect to pay is a dishonoring of his promise, and is a warning to all subsequent takers of the note. He may have neglected to pay because he had a defense, or he may have paid the whole note. In short, it seems to me that no one can become a *bona fide* holder of a note so as to shut out a valid defense by the maker when such holder takes it after by its terms money is past due upon it."

In *First Nat. Bk. of St. Paul v. County Com'rs of Scott Co.*, 14 Minn. 77, it was held that on a purchase of municipal bonds, with past due interest coupons attached, the purchaser was put on his guard and took them subject to any infirmity of title. The court said: "The bonds were thus dishonored on their face. The interest, equally with the principal, is part of the debt which they were intended to secure, and it does not seem to us material whether the whole or only a part of that debt was overdue. When due the plaintiff has a right of action for the recovery of the interest as for any other installment due on the bond." This is in conflict with *Cromwell v. County of Sac*, *supra*.

As to the effect of suspicious circumstances, see *Farrell v. Lovett*, 68 Me. 296; s. c., 20 Am. Rep. 59.

MADDEN V. BARNES.

(45 Wis. 135.)

Vendor on purchaser — vendor's lien — taking check and withdrawal of funds.

On a purchase of land the vendee gave his bank check for the amount of a cash payment. The check was not presented until four weeks afterward, and there were no funds to pay it, the vendee having withdrawn them two weeks previously. *Held*, that the vendor's lien was not lost.

SUIT to enforce a vendor's lien. The opinion states the facts. The plaintiff had judgment below.

Cassoday & Carpenter, for appellant.

Winans & McElroy, for respondent.

ORTON, J. On or about the 12th day of May, 1876, Clarence L. Steele and William Q. Barnes, appellant, purchased of James Madden, the respondent, certain lands and lots in the city of Janesville, for the sum of \$2,700, and received a conveyance of the same. The consideration was paid, or agreed to be paid, as follows: A mortgage upon the premises to one John Conway for \$1,337.70 assumed, and a mortgage given upon the premises to secure the payment of \$400, and a secured note for \$600, and a cash payment for the balance of \$362.30. As for this cash payment, Steele gave the respondent his check for said sum of \$362.30, drawn on the First National Bank of Janesville, dated May 15, 1876. At this time, Steele had funds in said bank more than sufficient to meet and pay said check; but on and after the 31st day of the same month, he drew out of said bank all of his funds, leaving none to be applied to the payment of the check; and when, on the 13th day of June thereafter, the respondent presented the check at the bank, the payment thereof was refused for that reason.

The respondent at once notified Steele and Barnes of the non-payment, and demanded the money, which was refused.

This suit is brought to enforce an equitable lien upon the premises for, as it is claimed, this unpaid part of the purchase-money.

The law which must govern this case is tersely and comprehensively expressed by Mr. Justice COLE, in *Willard v. Reas*, 26 Wis. 540: "The vendor has an equitable lien upon the estate sold, for the unpaid purchase-money, as between [himself] and the [purchaser], unless there is either an express or implied agreement to waive such lien."

The only real question in this case, and unembarrassed by other questions discussed most ably by the appellant's counsel, which we do not deem material, is, was there a waiver of the equitable lien of the respondent upon the premises for this part of the purchase-money, by this transaction of the check? We are clearly of the opinion that there was no waiver of the lien, and no intention on the part of the respondent to waive such lien, nor any anticipation or expectation, at the time, that any contingency might occur by

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which this unpaid part of the purchase-money would continue the liability of Steele and *Barnes* beyond the time of the presentation of the check to the bank, and therefore no waiver of such lien could have been contemplated or considered by the respondent. In this respect the case would seem to come within the principle of *De Forest v. Holum*, 38 Wis. 516. Applying the language of the opinion in that case, by the learned justice, to the facts in this, the principle may be stated: "Failing the contingency, the whole purchase-money was satisfied [by the notes and mortgage given and the mortgage of Conway assumed, and the giving of this check]; happening the contingency, another sum would then become the purchase-money," etc. The contingency in this case, by which this part of the purchase-money remained unpaid, and a continuing liability of Steele and *Barnes* to the respondent therefor, was the unexpected act of Steele in withdrawing the fund from the bank upon which the check was drawn; and such a contingency, so unexpected by the respondent and so unlikely to occur, repels the idea, or even the presumption, that the respondent intended by taking the check to waive his lien.

A check upon a bank purports to be drawn upon a deposit in the bank by the drawer (2 Dan. on Neg. Insts., § 1569); and if there was no such deposit in the bank, it would be a fraudulent check; and though a check, nevertheless it would certainly be no payment in itself. The check presupposes a fund in the bank at the time; and does it not also presuppose that such fund shall so remain in bank to meet the check when presented, or at least that the drawer of the check will not commit the fraud of withdrawing the fund from the bank?

When such a fraud is committed, the vendor will not lose his lien on the estate sold, for such part of the purchase-money as remains unpaid, by reason of the fraud. *Tobey v. McAllister*, 9 Wis. 463. Such withdrawal of his funds from bank by the drawer of the check before its presentation is a fraud upon the vendor to whom the check is given in the place of the payment of money. 2 Dan. on Neg. Insts., § 1596, and cases cited in note. These principles are so obvious and elementary that it would be a waste of time, and imply a doubt where there is absolute certainty, to elaborate or pursue the subject further.

BY THE COURT. The judgment of the Circuit Court is affirmed with costs.

RYAN, C. J., took no part.

Judgment affirmed.

STATE EX REL. BURFEE V. BURTON.

(45 Wis. 150.)

Schools — mandamus — to compel teacher of public school to reinstate expelled pupil.

In matters where the board of control of public schools have made no regulations for the government of the schools, the teachers stand *in loco parentis*, and have inherent power to suspend pupils, for cause, and mandamus will not lie to compel such a teacher to reinstate such a suspended pupil.

MANDAMUS. The relator charged that the defendant, a school teacher, unlawfully suspended and expelled the relator's son from school, and demanded his readmission. The return averred that the suspension was for bad conduct, and was subsequently approved by the board of education. The relator had judgment on demurrer.

Bennett & Sale, for appellant.

Winans & McElroy, for respondent.

LYON, J. The power of the board of education to suspend a pupil from the privileges of the schools under its charge, and even to expel him, for persistent misconduct, is freely conceded by the learned counsel for the relator. That the acts of misconduct charged against the relator's son in the defendant's return to the alternative writ of *mandamus* furnish sufficient grounds for suspending him, we cannot doubt. And moreover, if he was lawfully suspended, no sufficient grounds for restoration are stated in the affidavit for the writ. Indeed, the return shows affirmatively that he has not placed himself in a position to entitle him to restoration.

On the argument of the appeal, counsel informed us that the learned Circuit judge held that the defendant has no power to suspend a pupil for any cause, such power being vested by law exclusively in the board of education, and that the demurrer to the return was sustained on that ground. Whether the defendant has such power of suspension, and if so, whether it was properly exercised in the present case, are the controlling questions to be determined in this appeal.

While the principal or teacher in charge of a public school is subordinate to the school board or board of education of his district or city, and must enforce rules and regulations adopted by the board for the government of the school, and execute all its lawful orders in that behalf, he does not derive all his power and authority in the school and over his pupils from the affirmative action of the board. He stands for the time being *in loco parentis* to his pupils, and because of that relation he must necessarily exercise authority over them in many things concerning which the board may have remained silent. In the school, as in the family, there exist on the part of the pupils the obligations of obedience to lawful commands, subordination, civil deportment, respect for the rights of other pupils and fidelity to duty. These obligations are inherent in any proper school system, and constitute, so to speak, the common law of the school. Every pupil is presumed to know this law, and is subject to it, whether it has or has not been re-enacted by the district board in the form of written rules and regulations. Indeed it would seem impossible to frame rules which would cover all cases of insubordination and all acts of vicious tendency which the teacher is liable to encounter daily and hourly.

The teacher is responsible for the discipline of his school, and for the progress, conduct and deportment of his pupils. It is his imperative duty to maintain good order, and to require of his pupils a faithful performance of their duties. If he fails to do so, he is unfit for his position. To enable him to discharge these duties effectually, he must necessarily have the power to enforce prompt obedience to his lawful commands. For this reason the law gives him the power, in proper cases, to inflict corporal punishment upon refractory pupils. But there are cases of misconduct for which such punishment is an inadequate remedy. If the offender is incorrigible, suspension or expulsion is the only adequate remedy. In general, no doubt the teacher should report a case of that kind to the proper board for its action in the first instance, if no delay will necessarily result from that course prejudicial to the best interests of the school. But the conduct of the recusant pupil may be such that his presence in the school for a day or an hour may be disastrous to the discipline of the school, and even to the morals of the other pupils. In such a case, it seems absolutely essential to the welfare of the school that the teacher should have the power to suspend the offender at once from the privileges of the school ; and

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he must necessarily decide for himself whether the case requires that remedy. If he suspends the pupil, he should promptly report his action and his reasons therefor to the proper board. It will seldom be necessary for the teacher in charge of a district school to exercise this power, because usually he can communicate readily with the district board, and obtain the direction and order of the board in the matter. But where the government of a public school is vested in a board of education (as in the present case) with a more numerous membership than district boards, and which holds stated meetings for the transaction of business, the facilities for speedy communication with the board may be greatly decreased, and more time must usually elapse before the board can act upon a complaint of the teacher. In those schools, the occasions which require the action of the teacher in the first instance will occur more frequently than in the district schools. We conclude, therefore, that the teacher has in a proper case the inherent power to suspend a pupil from the privileges of his school, unless he has been deprived of the power by the affirmative action of the proper board.

In the present case we think that the acts of misconduct alleged against the relator's son in the return to the alternative writ were of a character which justified the defendant in suspending him temporarily, without the previous order of the board of education. Although, for the purposes of this appeal, the specifications of misconduct contained in the return are admitted by the demurrer, we abstain from setting them out here, because it might be unjust to the relator and his son to spread those specifications upon our records before there has been an opportunity to controvert them.

It is believed that the conclusions we have reached in this case are in accord with the uniform rulings of the department of public instruction on kindred questions. The decisions by that department of questions within its jurisdiction are entitled to great weight, and should never be overruled by the courts unless clearly contrary to law.

Certain special grounds of demurrer are assigned, but we do not deem it necessary to pass upon them. If any of them are well assigned, leave should have been given to amend the return in the particulars wherein it is defective. Such leave would have been given, doubtless, had the ruling of the Circuit Court been based upon the special grounds assigned.

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It follows from the foregoing views that the Circuit Court erred in sustaining the demurrer to the return.

We have grave doubts whether the writ of mandamus can issue in any case to the teacher in charge of a public school to compel him to reinstate a suspended pupil, but have concluded to leave that question undetermined on this appeal. We, however, suggest to counsel for the relator the questions whether, in case the averment in the return is true, that the board of education has ratified and confirmed the act complained of, the whole matter has not passed beyond the control of the defendant, and whether the writ can now go to any person or body other than the board.

We may be permitted to add, in conclusion, that our system of public schools necessarily involves the most delicate relations between parents and children on one side and the school authorities on the other, and controversies must frequently arise growing out of the enforcement of school discipline. These controversies, relating, as they usually do, to the control, management and correction of pupils, are apt to have their origin in wounded parental feelings, and are frequently prosecuted with much bitterness. It is cause for congratulation that so few of these controversies appear in the courts. Most of them are determined by the superintendent of public instruction, whose decisions are almost invariably acquiesced in. This result is due to the ability and good judgment of the gentlemen who have severally filled that high office for a long series of years, aided, as we doubt not many of them have been, by the valuable counsels of the present learned and able assistant superintendent, who has long served in that position greatly to the benefit of the State. We regret that this unfortunate controversy could not have been adjusted in the same manner.

BY THE COURT. The order of the Circuit Court is reversed and the cause remanded for further proceedings according to law.

RYAN, C. J., took no part.

Reversed and remanded.

OSBORN V. BAIRD.

(45 Wis. 189.)

Negotiable instruments — payment of, before maturity — agent for receiving payment.

Defendant executed his note to plaintiff payable in ten days at bank. He paid the amount to the bank two days after, but the note was not there. Three days later the plaintiff sent him printed notice of the time and place of payment, and that it was then in the bank, with a printed memorandum on the back, in three languages, that a like notice was sent to all the plaintiff's customers, that the note might be paid before maturity, with a deduction of interest, and that "the agent" who held the note for collection would allow it on production of the notice. Two days later still the bank received the note from the plaintiff, and the next day suspended payment and never paid the amount to the plaintiff. *Held*, that the payment by defendant was effectual, and the note could not be enforced against him.

ACTION on a promissory note by defendant to plaintiffs, dated September 9, 1875, for \$30, due ten days after date, payable at the office of O. M. Tyler & Co.'s bank in Waukesha, with interest at the rate of ten per cent after due. On the 11th of September defendant paid the amount of the note into the hands of O. M. Tyler & Co., and took their receipt as follows: "Received of S. Baird eighty dollars to pay the note given by his son for a mower."

On or about the 17th of September, 1875, said note was received by O. M. Tyler & Co. from the plaintiff for collection; O. M. Tyler & Co. were then doing business as usual, but on the 18th suspended and closed their doors, and on the 20th of September made an assignment under the insolvent laws of this State, and never paid to the plaintiffs the amount of this note or any part thereof. The following letter and notice was mailed at Chicago to the defendant on the 15th of September, 1875:

"Your note for \$30 and interest, to the order of D. M. Osborn & Co., and indorsed ———, becomes due on the 19th day of September next, and is payable at the office of O. M. Tyler & Co., bankers, Waukesha, Wis., where the note now is; and it is particularly desirable for you to pay it promptly when due."

On the back of this letter was the following:

"We send a notice like this for each of our customers' notes, for our mutual convenience, so that there may be no mistake about

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the day and place of payment. We trust every one will understand our motive in giving this notice, and take no offense. We expect all notes will be paid on the day they are due. Remember that you may pay and take up your note now, or at any time before due, if you choose ; thus having to pay interest only up to the time you pay. The agent who has the note for collection will allow you to do this, if you show him this notice. Do not forget to take along money enough to pay the interest up to the time you pay the note."

Defendant had judgment below.

Samuel A. Randles, for appellants.

Vernon Tichenor and *J. V. V. Platto*, for respondent.

TAYLOR, J. We do not find any error in the proceedings or judgment. The defendant paid the money to the plaintiff's agent at the place where the note was payable. It is true the payment was made before the note was due ; but he was expressly authorized by the plaintiffs to pay it before the same was due. The note was not in the hands of the agent at the place of payment, when payment was made ; but it was at that place and in the hands of such agent before he failed and closed his doors. There are two aspects of the case, either of which we think will sustain the judgment. It may well be inferred from the memorandum on the back of the circular letter, that the agent at whose place of business this note was payable had a general authority to receive payment in advance on all of the plaintiffs' notes made payable at his office ; and consequently it was a good payment when it was made. The evidence shows that the letter given in evidence is a printed form, and that the indorsement on the back is also printed in three languages, English, Norwegian and German. It may fairly be inferred from this fact that it was their general mode of doing business to permit the payment of their notes before they were due, and that their agents at the places where the same were made payable were instructed to receive such payments. It is also clear, that the plaintiffs' having sent their note to the agent at the place where the same was payable before it was due, and notifying the defendant that he could pay the same into the hands of such agent at any time before as well as after it was due, was a ratification of the payment made before the receipt of the letter ; and thereafter the agent held the money for the use of the plaintiffs, and not for the

use of the defendant. The money was in the hands of the agent to pay the note, and there being authority to pay at any time before due, the note was paid as soon as the agent received the same. It would have been an idle and unnecessary ceremony for the defendant to call upon the agent, and say to him that the money he had already received in payment of the note should be then applied to such payment. The maker of the note had the right to rely upon his payment already made, as a satisfaction of the same, as soon as the note came to the hands of the plaintiffs' agent, who was authorized to receive and who had received his money in payment thereof.

In this case, if either party is to suffer a loss by the failure of the person at whose office the note was made payable, it should be the plaintiffs. They made this note payable at the office of the failing party, and thereby constituted him their agent to receive the money on the note; and he having received such money of the defendant in payment of the same, although before the note was due, yet, having authority so to receive the same, the loss, if any, arising from his subsequent failure should fall upon the plaintiffs.

BY THE COURT. The judgment of the Circuit Court is affirmed.
RYAN, C. J., took no part. *Judgment affirmed.*

CORK V. BACON.

(45 Wis. 192.)

Negotiable instruments — check — false description of drawee — laches in presenting.

A, B and C resided in W. A kept his bank account with D, a private banker there, who was well known to B and C, and with whom C had sometimes done his banking business. A gave to B a check, good at the time, using a blank check upon the First National Bank of Milwaukee, erasing the words "First National," and writing above them the name of D, but neglecting to erase the words "Bank of Milwaukee." B, two days later, sold the check to C, who held it a week, and then D failed, and it was never paid. *Held*, that no action could be maintained against A upon the check.

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ACTION on the following check:

“ \$35.00.

MILWAUKEE, *Sept. 9th*, 1875.

“ ‘O. M. Tyler, Bank of Milwaukee. Pay to ——— Willets
or bearer thirty-five dollars. W. D. BACON.’

The complaint alleged that the plaintiff was the owner and holder for value ; that there is no such bank and, at the time the check was given, there was no such bank in existence as O. M. Tyler, Bank of Milwaukee; and that defendant, as the drawer, has refused payment. The answer set up that O. M. Tyler was a private banker, and doing business as such in the village of Waukesha ; that at the time the check was given, and for nine days thereafter, and after the plaintiff became the holder thereof, defendant had funds more than sufficient to meet and pay said check, and all other checks drawn by him, in the hands of said Tyler; that plaintiff was guilty of negligence and *laches* in not presenting said check to said Tyler, until, on the 18th of September, 1875, he, the said Tyler, became insolvent and a bankrupt ; and that the plaintiff had not given defendant any notice of non-payment, etc.

The plaintiff testified, substantially, that he had made inquiry if there was such a bank as the check purported to be drawn upon, and that he found no such bank as O. M. Tyler, Bank of Milwaukee; that he purchased the check about a week before the failure of O. M. Tyler; that he had sometimes bought drafts of O. M. Tyler's bank in Waukesha; had done business there probably six or seven years; had made deposits with O. M. Tyler when he first commenced business at the same place; that his store is nearly opposite, seven or eight rods from O. M. Tyler's door; that O. M. Tyler did business there about a week after he purchased the check; and that he never presented the check to O. M. Tyler for payment. The payee of the check, James F. Willets, called as a witness by the defendant, testified that when the check was given he resided in Waukesha, and knew both the plaintiff and O. M. Tyler; and the following questions were propounded to him by the counsel of the defendant, to which objection was made by the plaintiff's counsel and sustained by the Circuit Court: “ Did you know O. M. Tyler's bank and place of business when you took the check ? ” “ Had you before this received from the defendant any check similar to this, payable at O. M. Tyler & Co.'s bank ? ” “ Did O. M. Tyler ever

pay to you the money on any check drawn like this by Mr. Bacon?" "Did you know, when you received this check, where O. M. Tyler's place of business and bank was?" "Have you had, within the past year, any business with O. M. Tyler at his bank in Waukesha?" "Did you inform the plaintiff, when you passed this check, whom and what bank it was drawn upon?" This witness, after testifying that he had presented the check to the defendant just after O. M. Tyler failed, and that before that he had made no effort to collect it from any one, was asked: "Did you know, when you took that check, where it was payable?" and he answered, "Yes, sir;" and on motion the Circuit Court struck out this answer.

The defendant was sworn as a witness, and asked: "Where did O. M. Tyler reside at the time you delivered the check?" "Did you have funds in the hands of O. M. Tyler here in Waukesha subject to the payment of your checks and sufficient to pay this check, from the time you drew the check until the time he failed?" And these questions were also ruled improper. The opinion states other facts. The plaintiff had judgment below

J. V. V. Platto and Vernon Tichenor, for appellant.

Edwin Hurlbut, for respondent.

ORTON, J. The grounds relied upon in his brief by the counsel of the appellant for the reversal of this judgment are: 1st. That the burden of proof was upon the respondent to show that no funds were in the hands of the drawee, or the bank upon which the check was drawn, for its payment, and that he offered no such proof. 2d. That the respondent was guilty of negligence and laches in not presenting the check to the drawee before he had failed and become a bankrupt.

The sole ground relied upon by the counsel of the respondent to sustain the judgment is, that the check was fictitious or fraudulent, because drawn upon a bank which had no existence, and that therefore there was a present and continuing liability of the drawer to pay the money to the holder.

If the drawee of the check is sufficiently designated upon the check itself, or the holder knew in proper time upon whom or what bank the check was drawn, then the above positions assumed by the learned counsel for the appellant are unquestionably correct,

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for the bill of exceptions contains no such evidence, but most directly to the contrary.

The only questions really to be considered are those raised by the learned counsel for the respondent in support of the judgment, and which are only casually noticed by the counsel of the appellant. 1st. Does the check itself sufficiently designate the person or bank upon which it was drawn? 2d. If not, was it shown in the evidence given, or proposed to be shown in the evidence offered and ruled out, that the respondent knew in proper time upon what person or bank the check was drawn?

By reference to the check in the bill of exceptions, it appears that the check was a blank check of the "First National Bank of Milwaukee." The words "First National" were sought to be erased by parallel pencil lines, and the name of O. M. Tyler was written in pencil over them. The printed words "Bank of Milwaukee" are not erased. We think it can be ascertained with considerable certainty from an inspection of the check itself that it was intended to be drawn upon O. M. Tyler personally. His name is *certain* and unmistakable, while the additional words, "Bank of Milwaukee," are incongruous, ambiguous and meaningless as indicating or qualifying the person of the drawee, or as indicating the place where payment was to be made; and there is an apparent omission to erase them, through carelessness and not design; and, though a false description, it ought not to have deceived the payee, and could have been easily corrected if it had been of sufficient consequence to have attracted his attention. That part of the address so left uncrased may be rejected, within the principle of the maxim, *falsa demonstratio non nocet*.

But if there is any doubt about the correctness of this view of the case, we think there was abundant evidence that both the original payee and the holder of the check had full knowledge who the drawee actually was and of his place of business in Waukesha, in proper time to have obtained payment of the check upon presentation to O. M. Tyler, the drawee, and that both of them were guilty of negligence and laches in not so presenting it; that they held it at their own risk, and if, by the bankruptcy of the drawee, they have lost, it is by their own fault. Not only was the evidence allowed to be given competent and sufficient to prove these facts, but also the evidence sought to be elicited by the questions ruled out by the court was unquestionably proper and competent in the case; and

we think the Circuit Court erred in rejecting this evidence. It is unquestionably the general rule, that the drawee of a bill or check, whether an individual, copartnership or corporation, should be sufficiently expressed and designated upon it. Story's Bills of Ex., § 58. But the reason of the rule is only to enable the payee or holder to know upon whom he is to call for acceptance or payment; and it has been held that when the name of the drawee was not inserted in the bill at all, but only the place where the payment was to be made, and where a person certain resided and did business, and only such person, the bill was sufficiently certain in that respect. *Gray v. Milner*, 8 Taunt. 739. In case of uncertainty as to the real drawee attempted to be expressed or designated, or any ambiguity in the address of the check, then, as in all cases of written contracts and their construction, extrinsic evidence is admissible as to the subject-matter and the parties, to make both certain and show who and what was intended. 2 Pars. on Cont., § 500; *McCullough v. Wainright*, 14 Penn. St. 171; *Jackson v. Sill*, 11 Johns. 201. In this last case the court says: "You must always look beyond the instrument itself to some extent, in order to ascertain who is meant. For instance, you must look to names and places."

The situation of the parties and the nature of the subject-matter of the contract may always be shown by parol, in construing it. In *Lemon v. French*, 25 Wis. 37, parol evidence was allowed to make certain the time when an acceptance of a draft was payable; and in *Garrison v. Owens*, 1 Pin. 471, parol evidence was allowed to show in what capacity or character, as a party or witness, a person signed a contract.

We think the motion for a new trial in this case, made by the counsel of the appellant, should have been granted.

BY THE COURT. The judgment of the Circuit Court is reversed, with costs, and the cause remanded for a new trial therein.

Judgment reversed.

RYAN, C. J., took no part.

Morgan v. Burrows.

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(45 Wis. 211.)

Will — parol evidence to explain ambiguity.

A will described one boundary of a tract of land devised, in terms in fact applicable to two different lines. *Held*, that parol evidence of the testator's intent, in including his declarations at the time of execution, was admissible to identify the boundary.*

ACTION to recover possession of land. The opinion sufficiently states the point. The plaintiff had judgment below.

Bennett & Sale, for appellants. The court erred in admitting testimony as to what the testator said in reply to the question what he meant by the words "barn large yard." 1 Redf. on Wills, 496-8; *Brown v. Selwin*, Cas. temp. Talbot, 240; 3 Brown's Cas. Parl. 607; 1 Brown's Ch. Cas. 477; *Lord Cheney's case*, 5 Coke, 68a; *Vernon's case*, 4 id. 1-4; *Bertie v. Falkland*, 1 Salk. 231; *Towers v. Moor*, 2 Vern. Ch. 98; *Bennet v. Davis*, 2 P. Wms. 316, 318; *Fowler v. Fowler*, 3 id. 353-4; *Fry v. Porter*, 1 Mod. 310; *Sanford v. Raikes*, 1 Mer. 646; *Langston v. Langston*, 8 Bligh (N. S.), 167; *Farrar v. Ayres*, 5 Pick. 404; *Barrett v. Wright*, 13 id. 45; *Osborne v. Varney*, 7 Metc. 301; *Tucker v. Seaman's Aid Society*, id. 188; *Brown v. Saltonstall*, 3 id. 423; *Gerish v. Towne*, 3 Gray, 82, 88; *Woods v. Sawin*, 4 id. 322; *Bradley v. Bradley*, 24 Mo. 311; *Gregory v. Cowgill*, 19 id. 415; *Avery v. Chappel*, 6 Conn. 270; *Seaman v. Hogeboom*, 21 Barb. 398; *Russel v. Werntz*, 24 Penn. St. 337; *Fish v. Hubbard's Adm'rs*, 21 Wend. 651; *Ryerss v. Wheeler*, 22 id. 148; *Cromer v. Pinckney*, 3 Barb. Ch. 474; *Fouke v. Kemp*, 5 Har. & J. 135; *Asay v. Hoover*, 5 Barr, 21; *Judy v. Williams*, 2 Cart. 449; *Ferguson v. Mason*, 2 Sneed, 618; *Shearman v. Angel*, Bailey's Ch. 351; *Aspden's Estate*, 2 Wall. 368; *Allen's Ex'rs v. Allen*, 18 How. 385; *Ex parte Hornby*, 2 Bradf. 420. Parol evidence is not admissible to explain a latent ambiguity. *Davis v. Davis*, 8 Mo. 56; *Johnson v. Johnson*, 32 Ala. 637; *Domestic, etc., Missionary Society v. Reynolds*, 9 Md. 341; *Field v. Eaton*, 1 Dev. Eq. 283; *Rothmahler v. Myers*, 4 Desaus. 215; *Hyatt v. Pugsley*, 23 Barb.

*Compare *Griscom v. Evens* (11 Vroom, 402), 20 Am. Rep. 251.

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285; *Terpening v. Skinner*, 30 id. 373; *Waugh v. Waugh*, 28 N. Y. 94.

Pliny Norcross, for respondent.

LYON, J. The case turns upon the construction of certain clauses in the will of James Sowle. The plaintiff claims that the line B on the plat, south of the small barn, is the north line of the lands devised to the defendant, Mrs. Burrows, and that the land devised to the widow of the testator for life, with remainder to the children of the testator, includes both tracts, containing respectively fourteen and seven-twelfths acres and six and one-third acres. The former tract extends to the west line of the homestead lot.

The defendants claim that the line A on the plat is the north line of the land devised to Mrs. Burrows, and that the only land affected by the devise to the widow is the six and one-third acres lying north of line A. On the trial the defendants offered the plaintiff a judgment for the recovery of an undivided one-fourth of the six and one-third acres.

It will be seen, therefore, that the controversy in this action is confined to the fourteen and seven-twelfths acres, and depends entirely upon the solution of the question whether line A or line B is the north line of the land devised to Mrs. Burrows.

The record contains a copy of the last will of James Sowle, which is evidently intended to be a *fac simile* of the original, in which the devise to the defendant, Mrs. Burrows, appears as follows:

“I will to Mary ^{my daughter} Burrows the homestead from Burdick’s line south to the north to the barn ^{Lar large} yard, thence east to Hutson’s line.”

Looking at the plat of the testator’s homestead (so called), unaided by any other testimony, we find two barns upon it, designated respectively as the “large barn” and the “small barn.” We also find an inclosure adjoining the large barn on the east, south and west, and another inclosure, apparently of about the same size, adjoining the small barn on the east and south. Either of these inclosures may aptly be designated as a yard or barn-yard; and the testator manifestly referred to one or the other of them, as such, in the devise to Mrs. Burrows. The area of the two inclosures being about equal, the adjective “large” applies as well to one of them as the other.

Considering the will alone, there is no ambiguity in the terms

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of the devise to Mrs. Burrows. Her north line is plainly located at the south line of the large yard or barn-yard, and from thence east to Hutson's line. But when we look for her line, we find two lines corresponding with the description in the will. Here we have an ambiguity, not in the will, but produced by extraneous circumstances. This is a latent ambiguity.

That such an ambiguity may be removed by proof of extraneous facts is too well settled to be questioned or doubted.

The rule is thus stated by Sir James Wigram in his admirable treatise on Extrinsic Evidence in aid of the interpretation of wills : " Where the object of a testator's bounty, or the subject of disposition (*i. e.*, *person* or *thing* intended), is described in terms which are applicable indifferently to more than one *person* or *thing*, evidence is admissible to prove which of the persons or things so described was intended by the testator." O'Hara's 2d Am. ed. 188. The principle of this rule has frequently been asserted and applied by this court. *Ganson v. Madigan*, 15 Wis. 144; *Prentiss v. Brewer*, 17 id. 635; *Rockwell v. Ins. Co.*, 21 id. 548; *Sydnor v. Palmer*, 29 id. 226; *Strohn v. Ins. Co.*, 33 id. 648; *Att'y-Gen. v. Conklin*, 34 id. 21; *Lyman v. Babcock*, 40 id. 503.

Applied to this case, the rule does not go to the extent of admitting extrinsic evidence to contradict or change the terms of the will, but only to identify the land which the testator devised. Whether such evidence establishes line A or line B as the true line, full effect will be given to the will as it is written. The admission of such evidence is no encroachment upon the rule (to sustain which numerous cases were cited), that "in general, parol evidence of the *intention* of the testator is inadmissible for the purpose of explaining, contradicting or adding to the contents of the will; but its language must be interpreted according to its terms." In most of the cases cited to this rule, the rejected testimony was offered for the purpose of varying or contradicting written instruments, to supply omissions or correct mistakes therein, or to explain patent ambiguities. In many of them, the competency of such evidence to explain latent ambiguities is expressly affirmed.

The learned Circuit judge admitted proof of the declarations of the testator, made at the time he executed his will, to the effect that in the devise to Mrs. Burrows he intended the small barn. It is claimed by counsel for the defendants that this was error, and he read cases which he claims hold that the testimony was not compe-

tent. The case mainly relied upon to sustain this position is that of *Ryerss v. Wheeler*, 22 Wend. 148. We think that the case does not hold the doctrine contended for. The testator devised his "back lands," *eo nomine*, and the question was whether evidence of his declarations designating those lands was competent. It does not appear in the case when the declarations were made. The evidence was held admissible. Mr. Justice COWEN, delivering the opinion of the court, said: "The form of one of the objections at the trial seems to suppose that the testimony came within those cases which refuse the testator's declarations intended by him directly to explain the words of his will; and I agree that such declarations, especially if they were made at the time of framing the will, are not admissible." This is the portion of the opinion relied upon. But the remark quoted has reference to a case where the evidence is offered *to explain the words of the will*, and not to a case like this where the words are unambiguous, and where the evidence is offered to ascertain *the thing* to which the words relate. After citing many cases in which proof of such declarations was admitted (none of which exclude those made at the execution of the will) the learned judge proceeded to say: "So much for the declarations of the testator. They are clearly receivable as giving either a name or character to the devisee or the property devised; and that, too, as appears by the cases, whether such declarations be made before or after the will was executed." The case is authority for the admission of the declarations of the testator in a case like this, if made before or after the execution of the will, and it falls far short of being authority against receiving his declarations made at the time of its execution.

Wigram, in his treatise before referred to, p. 252, states the rule to be that where parol evidence of the declarations of the testator are admissible, it is immaterial whether the declarations were prior, contemporaneous with or subsequent to the making of the will, provided they relate to the intention he had at the time of making the will. See, also, 1 Redf. on Wills (4th ed.), 502, 507, 540. In *Ganson v. Madigan*, 15 Wis. 144, DIXON, C. J., in discussing this question, says: "If the evidence of surrounding facts and circumstances is admitted to explain the sense in which the words were used, certainly proof of the declarations of the parties made at the time, of their understanding of them, ought not to be excluded. *Reay v. Richardson*, 2 C., M. & R. 422; *Emery v. Web-*

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ster, 42 Me. 204; *Waterman v. Johnson*, 13 Pick. 261. Such declarations, if satisfactorily established, would seem to be stronger and more conclusive evidence of the intention of the parties than proof of facts and circumstances, since they come more nearly to direct evidence than any to be obtained, whilst the other is but circumstantial." P. 154. We are satisfied that the rule as here stated is supported, not only by the great weight of authority, but by the stronger and better reasons. We therefore adopt it as the correct rule, and hold that the evidence of the declarations of the testator, made when he executed the will, was properly received.

[Omitting discussion of effect of evidence.]

Judgment affirmed.

RYAN, C. J., took no part.

MURPHY V. CHICAGO AND NORTH-WESTERN RAILWAY COMPANY.

(45 Wis. 222.)

Negligence — contributory — communication of fire.

In an action for injuries by fire to buildings adjacent to a railway, caused by negligent management or construction of the defendants' locomotives, it appeared that the plaintiff had suffered an accumulation of hay and shavings, between the buildings burned, and under one of them which was placed on blocks, with the side next the railway open. *Held*, that this was evidence of contributory negligence which should be submitted to the jury.*

ACTION to recover the value of a small shop and a large barn and their contents, alleged to have been burned by the defendants' negligence. The buildings were on the east side of a street, and within twelve feet of the main track of the defendants' railway, in Fond du Lac, the railway running along the street. The barn was used for pressing and storing hay; the shop was a carpenter's shop, and placed on blocks two and a half feet high, and the side next the railway was open. Straw, hay and shavings had accumulated under the shop, and between the two buildings, loose hay. The plaintiff had been warned of the dangerous exposure of his buildings to fire. The fire commenced in or under the small building and com-

* See *Phila. & Read. R. R. Co. v. Hendrickson* (80 Penn. St. 182), 21 Am. Rep. 97.

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municated to the other, there being a high wind from the west, and the weather being dry. Just before the fire an engine passed on the railway, scattering coals and cinders along the street, and the engine was not properly constructed to prevent the escape of coals and cinders. The judge refused to submit to the jury the question of contributory negligence on the part of the respondent, predicated upon the evidence that he allowed hay, straw and shavings to accumulate under the small building; that he allowed the space between the sills of said building next the railroad to remain open; and that he allowed the hay, in unloading it from the wagons into the barn, to scatter upon the ground near the line of the track, and to remain and accumulate there; but charged the jury as follows: "This obligation of care, the want of which constitutes negligence according to the circumstances, is imposed upon the party who uses the fire, and not upon the person whose property is exposed to damage by reason of the negligence of such party." And again: "While, as I have said, the defendants in this action had the right to use their way in the transaction of their legitimate business, while they had the right to use fire there, *the plaintiff on his part had a right to use his own land adjoining the track of the defendant as he saw fit*; and if, through the negligence of the defendant, the property of the plaintiff took fire, the defendant is liable to the plaintiff for the damages sustained." The plaintiff had judgment below.

C. A. Eldredge and William Ruger, for appellant.

E. S. Bragg, for the respondent, upon the question of contributory negligence, cited Kellogg v. C. & N. W. Railway Co., 26 Wis. 244; s. c., 7 Am. Rep. 69; Spaulding v. C. & N. W. Railway Co., 30 Wis. 111; s. c., 11 Am. Rep. 550; Read v. Morse, 34 Wis. 318; Higgins v. Dewey, 107 Mass. 499; s. c., 9 Am. Rep. 63; Webb v. R. W. & O. R. R. Co., 49 N. Y. 420; s. c., 10 Am. Rep. 389.

TAYLOR, J. The refusal of the learned Circuit judge to give the instructions asked upon the question of plaintiff's contributory negligence, and the instructions given by him to the effect that the jury were not to consider that question upon the facts presented by the evidence, were based, it is said, upon the decisions of this court in the cases of *Kellogg v. Railway Co.*, 26 Wis. 223; s. c., 7 Am. Rep. 69, and *Erd v. Railway Co.*, 41 Wis. 65; he holding that these

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decisions had established the rule in this State, that the owner of property adjoining the line of a railroad might in the language of the learned judge, "use the same as he saw fit," and yet recover against the railroad company, if, by the negligence of such company, the same was set on fire and burned, and that in such case the general if not the universal rule, that in an action to recover damages resulting from the negligence of the defendant, if the negligence of the plaintiff contributed directly or as an approximate cause to the occurrence from which the injury arises, the plaintiff cannot recover, does not and cannot apply.

We think the learned Circuit judge has extended the principle of the decisions above referred to much farther than the facts upon which the same were based will authorize.

It is a well-settled rule in applying the decisions of the courts of last resort, that the decision must be limited to the facts of the particular case in which the decision is made, and if a general rule or principle is to be founded upon such decision, such general rule will be controlled and limited by such facts. To understand the scope of the decisions of this court in the cases of *Kellogg v. Railway Co.* and *Erd v. Railway Co.*, it becomes necessary to see what the facts were, and what questions were decided.

The only points necessarily decided in the case of *Kellogg v. Railway Co.* were: 1st. Whether the presence of dry grass and other inflammable materials on the line of the railroad, and which were suffered to remain there without care, was a fact from which a jury might find negligence against the railroad company; and 2d. Whether, because the plaintiff had permitted the weeds, grass and stubble to remain on his land immediately adjoining the railway of the defendant, he could be charged with contributory negligence so as to defeat his action for damages occasioned to his property from the spread of a fire kindled upon the right of way of the defendant, and spreading from thence to his land and destroying his property. On the trial of that action in the Circuit Court, the Circuit judge submitted the question to the jury, whether the fact that the plaintiff permitted such weeds, grass and stubble to remain on his land adjoining the railroad of the defendant was negligence on his part; and the jury found it was not. The defendant asked the learned Circuit judge to charge the jury that it was negligence, as a matter of law, for the plaintiff to suffer such weeds, grass and stubble to remain on his land adjoining

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the railroad. This the judge refused to do, and the exception was to the refusal of the court to so charge the jury. This court held that such refusal to charge the jury was not error; and the late learned Chief Justice DIXON, in his opinion, argues the point with great ability, and not only insists that these acts of omission on the part of the plaintiff were not such acts that negligence *per se*, and as a matter of law, could be predicated thereon, but he goes much farther, and insists that they were not acts which tend to prove negligence on his part. Although what was said upon this subject beyond what was required to decide the exceptions taken by the defendant is not, perhaps, binding upon this court, and need not necessarily be held as *res adjudicata*, yet, as controlled by the facts in that case, we are not now disposed to question its correctness. There are, however, some things said by the learned chief justice *arguendo*, to which, if they are to receive the construction apparently given to them by the learned Circuit judge before whom the action at bar was tried, we cannot assent. If that case be construed to have decided that in every case a person owning lands adjoining the track of a railroad may use the same as he sees fit, so long as he does not use it unlawfully—in the sense of using it in such a manner as to subject himself to a criminal action—and still not subject himself to the charge of negligence in such use when seeking to recover of the railroad company for an injury to his property by reason of a negligent act on the part of such company, we dissent from that construction; and we do not feel bound to hold that this court has so decided, even though it may be fairly inferred that such was the opinion of the learned chief justice who wrote the decision in that case.

With very much of the argument of the learned chief justice referred to we fully concur. On page 230 he says: “The evidence tends very clearly to establish these facts, and under the instructions the jury must have so found. The plaintiff is a farmer, and, in the particulars here in controversy, conducted his farming operations *the same as other farmers throughout the country. It is not the custom anywhere for farmers to remove the grass or weeds from their waste lands, or to plough in or remove their stubble, in order to prevent the spread of fire originating from such causes. Upon this question, as upon the others, the court charged the jury that it was for them to say whether the plaintiff was guilty of negligence, and if they found he was, that then he could not recover.* * * *

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The charge upon this point, as well as upon the other, was quite as favorable to the defendant as the law will permit, and even more so than some of the authorities will justify." The learned chief justice then proceeds to say that some of the authorities hold that the owner of lands adjoining a railroad is chargeable with negligence if he does not remove the dry grass and combustible material from his own land, and that he cannot recover damages when the loss by fire is communicated by means of such combustible matter on the plaintiff's land ; but he refuses to follow those decisions, and follows those holding a different doctrine, quoting as the cases relied on in his opinion, *Cook v. Champlain Transportation Co.*, 1 Den. 91 ; *Vaughan v. Taff Vale Railway Co.*, 3 Hurlst. & Norm. 743, and 5 id. 679. Of these cases the chief justice says : "The reasoning of those cases is, in my judgment, unanswerable. I do not see that I can add any thing to it. They show that the doctrine of contributory negligence is wholly inapplicable — that no man is to be charged with negligence because he uses his own property or conducts his own affairs as other people do theirs, or because he does not change or abandon such use, and modify the management of his affairs, so as to accommodate himself to the negligent habits or gross misconduct of others, and in order that such others may escape the consequences of their own wrong, and continue in the practice of such negligence or misconduct. In other words, they show that no man is *to be deprived of the free, ordinary and proper use of his own property* by reason of the negligent use which his neighbor may make of his." The argument of the chief justice above quoted, properly understood, is approved by the present members of this court ; and it is probable that no misunderstanding of the scope of the decision in that case would have occurred, had not the chief justice, in further illustration of his views, permitted himself to indulge in some general remarks, which were wholly outside the case, and which we are not inclined to follow to what is supposed to be their logical conclusion. Further along in the opinion, on p. 233, in speaking of the obligation of the railroad company to keep the dangerous element of fire so under control that it shall not escape and damage the adjoining owner, he says : "This obligation of care, the want of which constitutes negligence according to the circumstances, is imposed upon the party who uses the fire, and not upon those persons whose property is exposed to danger by

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reason of the negligence of such party. Third persons are merely passive, and have the right to remain so, *using and enjoying their own property as they will, so far as responsibility for the negligence of the party setting the unruly and destructive agent in motion is concerned.* If he is negligent, and damage ensues, it is his fault and cannot be theirs, unless they contribute to it by some unlawful or improper act. But the use of their own property as best suits their own convenience and purposes, or as other people use theirs, is not unlawful or improper. It is perfectly lawful and proper, and no blame can attach to them."

If the language of the learned chief justice last above quoted is to be construed, as it seems to have been by the circuit judge who tried the case at bar in the court below, that the owner of lands adjoining a railroad track may do as he sees fit upon such land, without being subject to the charge of want of care, or negligence, no matter how reckless such use or negligence may be, in an action to recover against the railroad company for negligently setting fire to the property of such owner, then we cannot approve of the language used by the chief justice, and we do not think that any such doctrine is established by the cases cited by him to sustain it.

In the case of *Cook v. Transportation Company*, above referred to, it was insisted that the plaintiff could not recover for the burning of his planing mill, which stood near a steamboat landing, and was set on fire by the carelessness of the persons managing the boat, on the ground that the plaintiff was guilty of negligence in locating his mill at that point. There was no evidence that he was guilty of any carelessness in the management of his mill or business, and the complainant alleged that the main building was covered with slate and boiler iron. BEARDSLEY, J., in his opinion, says: "A land-owner builds immediately on the line of a railroad, as he has an unquestionable right to do; it may be an act of great imprudence, but in no sense is it illegal. Is he remediless if his house is set on fire by the sheer negligence of an engineer in conducting his engine over the railway? There must be some wrongful act or culpable negligence on the part of the plaintiff to bar him on this principle; and neither can be affirmed of *any one for simply occupying a position of more or less exposure on his own premises.*" And in another place he says: "We must at last, I think, come to the conclusion, that while a person confines himself to a lawful employment on his own premises, *his position, however injudicious and*

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imprudent it may be, is not therefore wrongful ; and that his want of due care or judgment in its selection can never amount to negligence, so as thereby to deprive him of redress for wrongs done to him by others." It will be seen that all the court decided in this case was that contributory negligence could not be predicated upon the mere fact that the plaintiff placed his buildings near to the steamboat landing, where they would be more exposed to danger than in some other place. The court did not pass upon the question whether a careless and reckless use of such building in carrying on his business, thereby unnecessarily increasing the danger from fire, would or would not amount to such negligence. *Rowell v. Railroad*, 57 N. H. 132 ; s. c., 24 Am. Rep. 59, was decided under a statute similar to the statute in Massachusetts, and the court held that the statute made the railroad company liable absolutely for the destruction by fire of adjoining buildings, communicated by the use of engines on the line of its road, and that the doctrine of contributory negligence did not apply. In the case of *Fero v. R. R. Co.*, 22 N. Y. 214, the plaintiff was building an addition to a hotel, which stood within thirty feet of the railroad track, and which was burned on a dry, windy day by coals and cinders driven through a partly opened door into the shavings in the building in course of construction. BACON, J., who delivered the opinion of the court, says : "The fact, as disclosed by the evidence, appeared to be, that the fire was communicated by sparks or coals driven from the engine into the building of the plaintiff through a partly open door ; and it was insisted by the defendants, and the judge was asked to charge, that if the fire was thus communicated, the leaving open the door was an act of carelessness, which would preclude a recovery. This instruction the judge declined to give, but did charge that the plaintiff was bound to use such care in protecting his premises as a man of ordinary prudence would have employed under the circumstances, and if through his neglect or that of his employees, his house was consumed, or if such neglect on his part concurred with negligence on the part of the defendants in producing the result, the plaintiff could not recover. Whether leaving open the door constituted such negligence, was left as a question of fact to be determined by the jury. This portion of the charge is, in my judgment, wholly unexceptionable. It presented the legal principle which prevails in such cases, clearly to the jury, and in a manner entirely favorable to the defendant,

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and left, as it should, the question of fact to them upon the evidence."

Ingersoll v. Railroad Co., 8 Allen, 438, was an action to recover the value of a barn alleged to have been set on fire by an engine of the defendant company. The court say: "There is nothing to show that any fault of the plaintiff contributed to the loss, if the buildings were lawfully placed where they stood. The fact that a building or other property stands near a railroad or partly or wholly on it, if placed there with the consent of the company, does not diminish their responsibility, in case it is injured by fire communicated from their locomotives." In Massachusetts, as in most of the New England States, railroad companies are made liable by statute to pay for all buildings burned on the line of their road, where the fire originates from the use of their engines, whether occurring from negligence or purely accidental. But it is held that the same rule applies to the plaintiff, that if his negligence contributed to the loss, he cannot recover. See *Ross v. Railroad Co.*, 6 Allen, 87, cited below.

The case of *Vaughan v. Railway Co.*, 3 Hurl. & Nor. 743, was an action for burning the plaintiff's standing timber. The evidence showed that there were leaves and other combustible matter on the plaintiff's woodland adjoining the defendant's railway. The defendant's counsel asked that the court should submit to the jury the question whether the plaintiff had not been guilty of negligence in permitting the wood to be in a combustible state by not properly clearing it. The presiding judge refused to submit the question, and said to the jury that he thought there was no duty on the part of the plaintiff to keep his wood in any particular state. On the argument of a motion for a new trial, BRAMWELL, J., said: "It remains to notice another point made by the defendants. It was said that the plaintiff's land was covered with very combustible vegetation, and that he contributed to his own loss, and Mr. Lloyd very ingeniously likened the case to that of an overloaded barge swamped by a steamer. We are of opinion this objection fails. The plaintiff used his land in a natural and proper way, for the purposes for which it was fit. The defendants come to it, he being passive, and do it a mischief." The court approved of the refusal of the judge to instruct the jury as asked by the defendant.

A question similar to the questions considered in the cases above cited, came before the Supreme Court of New Jersey, and was decided in 1875. *Salmon v. Railroad Co.*, 38 N. J. 5; s. c., 20 Am.

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Rep. 356.* In this case it was held that a person owning land contiguous to a railroad is not obliged to keep the leaves falling from his trees from being carried by the wind to such railroad, nor to keep his lands clear of leaves and combustible matter ; nor on failure to perform such acts, does he become contributory to the production of a fire originating in the carelessness, on its own land, of the railroad company. Chief Justice BEASLEY, who wrote the opinion, says : “In the absence of special legislation, *a man does not become a wrong-doer by leaving his property in a state of nature.* If water falls upon the surface, he is not obliged to counteract the law of gravity in order to prevent such water from flowing on the adjacent land ; or if the soil becomes disintegrated by the action of heat, he is under no duty to prevent the dust there arising from being carried through the air into the house of his neighbor.” The learned chief justice then goes on to argue, that the plaintiff was under no legal obligation to prevent the leaves falling from his trees from being carried by the wind to the land of the defendant, and that “all land is subject to the servitude of receiving the leaves brought to it in the course of nature, and as a compensation, can dispose of its own leaves in the same manner. The consequence is, there was no negligence in the plaintiff’s allowing the leaves in question to be carried to the roadway of the defendant ; and that being so, it follows, that being on the land of the defendant rightfully, it became its duty to remove them when it desired to use fire on its land under dangerous conditions.” The point of the defense in this case was, that the winds had blown the leaves from the plaintiff’s woods on to the track of the defendant’s road, and they were there set on fire by the passing engines, and the fire so kindled spread to the adjoining woodlands of the plaintiff, and destroyed the timber standing thereon. The court held, as above stated, that there was no contributory negligence on the part of the plaintiff.

The case of *Earl v. Railroad Co.*, 41 Wis. 65, was an action to recover the value of a fence burned by the negligence of the railroad company, and the only contributory negligence charged against the plaintiff was, that he permitted leaves, dry grass and brush to remain on his land adjoining the line of the railroad at the place where the fire originated ; and this court held that such act of omission was not negligence.

* See S. C., 30 N. J. 299 ; 25 Am. Rep. 214.

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It is clear that none of the cases above cited — and they are perhaps the strongest ones that can be found in any of the books,—if the decisions are limited to the exact points presented by the facts, establish the doctrine contended for by the plaintiff in this action, and none of them negative the proposition that the owner of lands adjoining the track of a railroad may, by gross negligence in the manner of the construction of his buildings, or in the manner of conducting his business in and about the same, in the immediate vicinity of such railroad track, be chargeable with contributory negligence which might prevent a recovery by him in an action to recover for the destruction of such buildings or other property by fire communicated by the negligent act of the railroad company. It is not denied that the comments of the learned judges who delivered the opinions of the respective courts in the cases above cited, with the exception of the case of *Vaughan v. Railway Co.*, might be construed as sustaining the doctrine contended for in this case; but as authoritative decisions they do not go that length, and we are not inclined to follow the reasoning of the learned judges to the conclusion contended for.

The rule, that in actions to recover damages caused by the negligence of the defendant, negligence on the part of the plaintiff, which directly contributed to the occurrence which caused the damage, will defeat the plaintiff's action, is universal, unless a different rule be prescribed by statute. This rule was stated by the present learned chief justice in the case of *Curry v. Railway Co.*, 43 Wis. 675: "This is the true view of an action for negligence, going upon the sole negligence of the defendant, without contributory negligence of the plaintiff." "Actions for negligence impute the injury to the negligence of the defendant alone." In the case of *Murphy v. Deane*, 101 Mass. 464, Justice WELLS says: "Throughout the discussion the general doctrine is recognized, that negligence of the plaintiff, co-operating to produce the result, will defeat the action; that the negligence of the defendant must be the sole cause of the injury." The same rule is laid down in *Tuff v. Waxman*, 5 C. B. (N. S.) 573; and approved in *L., B. & S. C. Railway Co. v. Walton*, 14 Law Times (N. S.) 253. This rule is also illustrated in the case of *Walsh v. Porterfield*, 87 Penn. St. 376, where, in an action against an innkeeper by a guest for goods stolen from the guest's room, in which it was shown that at the

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time of the theft the guest was intoxicated, it was held that if his intoxication contributed in any way to the loss, he could not recover. Substantially the same rule was held in the case of *Jalie v. Cardinal*, 35 Wis. 118. The cases in this court do not controvert this rule; and the only question to be determined is, whether negligence can be imputed to the owner of lands or buildings adjoining a railway track, on account of any thing done by him, either in the location or manner of constructing such buildings, in the manner of maintaining them, the purposes for which he uses them, or the manner of such use. The learned Circuit judge before whom this action was tried instructed the jury that in relation to these matters no negligence could be imputed to such owner; that as to the railroad company, such owner is under no obligation to exercise any care in order to prevent an injury arising from the negligence of such company; and that no matter how gross the negligence of such owner in his business, or in the construction or use of his buildings adjoining the track of the railway, and no matter whether the exercise of the most ordinary care would have prevented the injury sustained, it is no defense to his action. We cannot sanction this broad doctrine, exempting the owner from the exercise of ordinary care in the management of his property. Such a rule is neither promotive of public nor private morals, and we think is not sanctioned by the weight of authority. The necessities of civilized society require very many limitations to the broad statement that a man may do as he sees fit on his own property. The laws in very many cases restrict such right, and punish the exercise of it. The municipal regulations of our cities prevent the carrying on of dangerous trades or the keeping of large quantities of dangerously explosive articles in the densely inhabited parts thereof. They interfere with and direct the manner in which buildings shall be constructed in order to prevent fires. In most cities in this country, the plaintiff would have been liable to fine and imprisonment for erecting the buildings burned, and using them in the manner he did, in the business parts thereof, and his buildings and business would have been declared a nuisance and subject to be abated.

We do not think that where the careless and negligent acts of a plaintiff result in kindling a fire on his own lands, he will be exempt from the charge of having contributed to the loss occasioned by such fire, merely because such negligent acts were done upon his own lands.

We are inclined to think the true rule, as to the care which a

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person owning lands adjoining a railway is required to take of his property, is well expressed in the charge of the learned judge in the case of *Fero v. Railroad Co., supra*, which charge was approved by the Court of Appeals of the State of New York: "That the plaintiff is bound to use such care in protecting his premises as a man of ordinary prudence would employ under the circumstances, and if through his neglect or that of his employees his house is consumed, or if such neglect on his part concurred with negligence on the part of the defendant in producing the result, the plaintiff cannot recover." This was substantially the charge of the court in the case of *Kellogg v. Railway Co., supra*, which was approved by this court. In *Ward v. Railway Co.*, 29 Wis. 144, which was an action for burning a warehouse and its contents adjoining the railroad track, the late Chief Justice DIXON, who also delivered the opinion in *Kellogg v. Railway Co.*, says: "In the present case, the situation of the plaintiff's warehouse, the materials and mode of its construction, the purposes for which it was used, its proximity to the railway track, and all circumstances enhancing the danger and risk of destruction from fire communicated by sparks from the locomotives which were constantly passing and repassing, may have been such as to have required great prudence and foresight on the part of the plaintiffs to prevent its taking fire from such cause; but still they were not required to exercise any greater prudence and foresight than persons of ordinary care, or men of business and heads of families, usually exhibit in their own affairs, *or than such persons usually exhibit or would be expected to exhibit under the same or like circumstances. The latter was no doubt the true measure of the care which was required of the plaintiffs.*" The same idea was also conveyed in the opinion of the chief justice in the case of *Martin v. R. R. Co.*, 23 Wis. 437-442, as follows: "The burning happened at the warm season of the year, when it is customary for most people, and convenience and comfort require them, to keep the windows of their houses wholly or partially open. Suppose, in such case, that the plaintiff's windows had, according to the general custom, been open, and the sparks had entered in that way, would it have been such a careless or improper use of her house as would have defeated a recovery?" The case was put by the court upon the ground that the evidence did not disclose a use of the premises which was not attended with the ordinary care which men under like circumstances give to the same.

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In *Cunningham v. Lyness*, 22 Wis. 245, the plaintiff was crowded from the dock into the water through the defendant's negligence in driving a team from a ferry boat on to the dock; and there was evidence tending to show negligence on her part in standing upon the edge of the dock. Justice COLE, who delivered the opinion, in commenting upon this part of the case, says: "It was claimed that she (the plaintiff) had taken an exposed position on the dock, and that thus, by occupying the position she did, she was guilty of negligence which essentially contributed to the injury. If this were so — and it is not impossible that a jury might have so found when considering all the evidence bearing upon that point — then we suppose no recovery could be had. Of course we express no opinion upon the weight of that evidence; all that we wish to be understood as saying is that there was sufficient testimony in the case to submit the question to the jury whether Mrs. Cunningham was guilty of negligence in occupying the position she did upon the dock which contributed to the unfortunate result."

Jones v. Railroad Co., 42 Wis. 306, was an action brought to recover the value of a horse killed by the defendant on its track, and it was held evidence tending to prove contributory negligence on the part of the plaintiff, that he, knowing the horse to be breachy and accustomed to jump fences, turned him into a pasture adjoining the railroad track near where he was killed. In *Lawrence v. Railway Co.*, 42 Wis. 322, which was an action to recover the value of an ox killed on the defendant's railroad, the present learned chief justice, in discussing the question of contributory negligence on the part of the plaintiff, says: "For, assuming the negligence of the respondent (defendant) in not restoring the fence within a reasonable time, which we are not quite prepared to hold in the circumstances disclosed, it would have been his own negligence, contributing directly to the injury, to leave his cattle at large for the day without purpose and by mere inadvertence, after the object for which they had been turned out had been effected, within some seventy rods of an operated railroad, without fence or obstacle to keep them from it." These cases abundantly show that a person may be charged with contributory negligence in the lawful use, management and control of his own property on his own land, which will defeat his recovery in an action for the destruction of the same by the negligence of another.

This rule is fully sustained by the decisions in many of the courts

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in other States. *Ross v. Railroad Co.*, 6 Allen, 87, was an action to recover the value of a building and its contents, which was burned by the sparks from a passing locomotive. The evidence tended to show that the fire was communicated by sparks from the engine falling upon a parcel of shavings in the shed of the plaintiff, the sparks passing through an open door toward the railroad, or upon the old and dry shingles of the roof of the shed, about ninety feet from the railroad; that the weather had been dry for some time previous, and the wind was blowing from the direction of the railroad. The defendant's counsel asked the judge to charge the jury, "that if the season was dry, and the wind was from the railroad and strong, and the plaintiff knew those facts and left a door of a shed open toward the railroad, and shavings within the shed, or old and dry shingles on the roof, known to him to be such, and either of those things contributed to the fire, it is negligence on his part, which should preclude a recovery." The court refused to give this instruction, but instructed the jury as follows: "That the plaintiff was bound to exercise ordinary care and prudence in reference to his property thus situated near a railroad; and that if they should find any want of ordinary care and prudence in reference to his property, by leaving open the door of the shed toward the railroad, or in reference to having shavings in the shed, or by reason of having old and dry shingles on the roofs of his buildings, he knowing the season was dry and that the wind was from the railroad, if either of the things mentioned contribute to the communication of the fire, the plaintiff could not recover." The plaintiff had a verdict, and the case was reported to the whole court for determination; and in the opinion affirming the judgment, BIGELOW, J., in passing upon this point, says: "As the case stood before the jury, it was a proper one to be submitted to practical men, having all the facts before them, to determine whether due care had been exercised by the plaintiff." The following cases hold to the same rule: *Kesee v. Railroad Co.*, 30 Iowa, 78, 82-5; s. c., 6 Am. Rep. 643; *Railway Co. v. Haworth*, 39 Ill. 346; *Railroad Co. v. Shanefelt*, 47 id. 497-502; *Railroad Co. v. Frazier*, id. 505; *Railroad Co. v. Nunn*, 51 id. 78; *Railway Co. v. Simonson*, 54 id. 504; s. c., 5 Am. Rep. 155; *Railroad Co. v. Maxfield*, 72 Ill. 95-100; *Railway Co. v. Brady*, 17 Kans. 380; *Coates v. Railway Co.*, 61 Mo. 38-44; *Smith v. Railroad Co.*, 37 id. 287-298; *Ewing v. Railroad Co.*, 72 Ill. 25; *Railroad Co. v. Todd*, 36 id. 413; *Bevier v. Del-*

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Ware & Hudson Canal Co., 13 Hun, 254-259; *Birge v. Gardiner*, 19 Conn. 507. Many of the cases here cited hold the owners of lands and other property adjoining the line of a railroad to the use of a much greater degree of care than has been required by the decisions of this court, and than this court as now constituted is disposed to require; but they all hold to the doctrine that such owner may be charged with contributory negligence in the lawful use of his own property on his own land.

In this State railroad companies are not liable for the destruction of property caused by the communication of fire from the engines used on their roads, unless such fire is communicated by reason of the negligence of the company, its employees or servants. And in that respect their liability differs from companies doing business in Massachusetts and most of the other New England States, where by statute the companies are held responsible without regard to their negligence. The action in the case at bar is an action to recover on account of the negligence of the defendant, and comes, therefore, within the rule which limits the plaintiff's right to recover to a case in which the negligence of the defendant alone is the cause of the injury, and in which negligence of the plaintiff which directly or proximately contributes to the injury, defeats the action.

Whilst we do not intend in this case to overrule any case heretofore decided in this court, limiting the decisions to the actual facts of the case decided, we do intend to hold, and do hold, that the doctrine of contributory negligence on the part of the plaintiff is applicable to the case at bar, as well as to all other cases where a recovery is sought to be had on the ground of the negligent acts of the defendant; and we further hold that the negligent and careless acts of the plaintiff upon his own lands adjoining a railroad, although such acts may be in themselves lawful, may amount to contributory negligence, according to the circumstances.

Without deciding that the mere location of a barn, carpenter shop, planing mill or other manufacturing establishment which is, from its nature, easily set on fire, within a few feet of a railroad track, in a city where trains are made up and engines necessarily pass and repass more frequently than on the ordinary line, would in itself be negligence which might defeat an action for their destruction by fire originating from the negligence of the company, we are inclined to hold, that in such case, the manner of constructing such buildings in such place, in-

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cluding the materials of which they are constructed, and the manner of their use after construction, are matters upon which negligence may be predicated; and that if such buildings are not constructed of such materials and in such manner as a man of ordinary prudence would construct the same under the circumstances, or if they are not used with the care with which a man of ordinary prudence would use them under like circumstances, and the want of such care, either in the construction or use of such buildings or management of such business, contributed directly to the communication of the fire which destroyed the same, then the owner cannot recover. In other words, if the jury to whom the facts are submitted find that the fire would not have occurred if the plaintiff had used the care in the construction, maintenance and use of his property which a man of ordinary prudence would have used under like circumstances, then the plaintiff cannot recover; but if the jury find that the fire would have been communicated although the plaintiff had used such care, then he can recover if the defendant was guilty of negligence, notwithstanding the negligence of the plaintiff. This is the rule which we think is well established by the authorities, and accords with justice and common sense. We see no reason why a man who recklessly and unnecessarily exposes his property to destruction by fire in the immediate vicinity of a railroad, which from the necessity of the case must use the dangerous element in carrying on its business, should as a general rule be protected, if by the use of ordinary care he could have avoided its destruction, any more than the man who recklessly and unnecessarily places his property upon the track, and it is thereby destroyed. We have no fault to find with the decisions of this court which hold that where an owner of lands adjoining a railroad uses them as men in like situation ordinarily use their lands, no negligence can be predicated upon such user. We agree with the case in New Jersey and the English cases cited, that the owners of woodlands adjoining railroads are not bound to gather up the falling leaves and other combustible material which may accumulate naturally thereon, nor to prevent the winds from carrying them upon the adjoining lands, and that a neglect to do so is not negligence, because men of ordinary prudence ordinarily permit the same things upon their lands under like circumstances; but we are inclined to hold that, where a person places a building so constructed as to be easily ignited by fire, or other property of a highly combustible

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nature, in the immediate vicinity of a railroad, without any protection, and thereby increases the chances of its destruction, or where he carries on a business in the immediate vicinity of such road, which from its nature is extremely hazardous in such vicinity on account of its susceptibility to ignition and combustion from the sparks emitted from the passing engines, and such property is destroyed from fire communicated by such engines, in an action to recover for the value thereof on account of the negligence of the railroad company, it necessarily becomes a question whether such building was constructed in such a manner as a person of ordinary care and prudence would have constructed it under like circumstances; or if it be combustible property, whether a man of ordinary prudence would have placed the same where it was placed by the plaintiff and with like protection against fire; and in the case of a business carried on, whether the business was conducted with that care with which a man of ordinary prudence would have conducted the same under the circumstances. In these cases the court cannot say, as a matter of law, that there was no contributory negligence on the part of the plaintiff, but the question should be submitted to the jury under proper instructions. It was said by the present chief justice, in the case of *Curry v. Railway, supra*, speaking of the statute requiring railroads to fence the line of their roads: "The statute was not intended or framed to relieve adjoining owners from diligence in the care of their domestic animals at the risk of danger to railroad trains, or to license negligence to establish cattle markets on railroads;" and we are of the opinion that the common law does not justify an adjoining owner in establishing a hay market, or a market for other highly combustible materials, in the immediate vicinity of a railroad, and there conduct such dangerous trade with a reckless want of care; nor does it authorize him to recover against the adjoining railroad company for a loss which his own recklessness invited, and which the use of ordinary care would have prevented. We think such conduct is "an improper act," within the meaning of that phrase as used by the late Chief Justice DIXON in *Kellogg v. Railway Co.*, 26 Wis. 234, and "culpable negligence on the part of the plaintiff," within the meaning of that phrase as used by Justice BEARDSLEY in *Cook v. Transportation Co.*, 1 Den. 100.

The evidence in the case at bar was such that it became the duty of the court to submit the question of contributory negligence on

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the part of the plaintiff to the jury, and that his refusal to do so was error, for which the judgment must be reversed. There are other questions in the case which might with propriety be discussed ; but as our time will not permit us to discuss every question raised and argued in this court, we content ourselves with the decision of the questions above discussed, as our opinion upon them necessitates the reversal of the judgment.

ORTON, J., concurs in the judgment on the ground that the facts tending to prove contributory negligence on plaintiff's part in the *use* of his building should have been submitted to the jury ; but he regards the question of the effect of contributory negligence in the *location or manner of construction* of buildings adjoining railways as not in the case, and declines to express any opinion on that question.

Judgment reversed, and cause remanded.

HUMPHREY V. TAYLOR.

(45 Wis. 251.)

Exemption from execution — farming tools to one not a farmer.

A statute, without naming any classes of persons entitled to exemption of property from execution, exempted "other farming utensils, including tackle for teams not exceeding \$50 in value." A judgment debtor, not a farmer, nor engaged in any business requiring the use of a mowing machine, owned one of less than \$50 value. It did not appear that he owned any tackle for teams. *Held*, that the mowing machine was exempt.

APPEAL from the Circuit Court of Walworth county. Replevin for a mowing machine seized by the defendant as sheriff, by virtue of executions issued upon judgments against the plaintiff. The Circuit judge instructed the jury, that if they found "that plaintiff's business was not farming, but that he was engaged wholly in other business, not requiring the use of a mower," they should "find for the defendant, whatever may have been the value of the mower." The defendant had judgment below.

H. S. Winsor, for appellant.

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LYON, J. Section 31, ch. 134, R. S. 1858, as amended, provides as follows: "No property hereinafter mentioned or represented shall be liable to attachment, execution or sale on any final process issued from any court in this State. * * * 7. Two cows, ten swine, one yoke of oxen and one horse or mule (or in lieu of one yoke of oxen and a horse or mule, a span of horses or a span of mules), ten sheep and the wool from the same; either in the raw material or manufactured into yarn or cloth; the necessary food for all of the stock mentioned in this section for one year's support, either provided or growing, or both, as the debtor may choose; also one wagon, cart or dray, one sleigh, one plough, one drag; and other farming utensils, including tackle for teams, not exceeding fifty dollars in value." Tay. Stats. 1550, § 32.

A mower is not specifically named in the statute; hence, if the mower in controversy is exempt property, it is so by virtue of the last clause of subdivision 7, which exempts "other farming utensils, including tackle for teams, not exceeding fifty dollars in value." It does not appear in this case that the plaintiff had any "tackle for teams" when the sheriff seized the mower.

The case turns upon this question: Is the plaintiff, who is not a farmer, and who, when the levy was made, was not engaged in any business requiring the use of a mower, entitled to the benefit of the exemptions given by the above statute? This is not an open question in this court. In *Knapp v. Bartlett*, 23 Wis. 68, this court held that articles exempted by subdivision 7 are exempted absolutely to all persons alike. The rule of that case is as broad as the statute, and every exemption that can be upheld in any case under subdivision 7, whether the exempted article be specifically named therein or not, must be upheld in favor of any debtor.

That a mower is a farming utensil, and that it may be exempt under certain conditions from seizure on execution (if its value does not exceed fifty dollars), we cannot doubt.

It is objected that there are no sufficient exceptions to enable this court to review the instructions given to the jury. The objection is not well taken. The instruction contained in the foregoing statement of the case was duly excepted to; and although it does not appear that all of the evidence is contained in the bill of exceptions, yet sufficient appears in the record to show the materiality of that instruction. We think the instruction erroneous. The jury should have been instructed that if the value of the mower was

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less than fifty dollars, the plaintiff had the right to hold it as exempt property; and that the sheriff should have delivered it up to him when he asserted his right and demanded the property.

BY THE COURT. The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

Judgment reversed, and cause remanded.

RYAN, C. J., took no part.

BURKHAUSER V. SCHMITT.

(45 Wis. 816.)

Mistake of law.

The plaintiff, proposing to buy of the defendant his interest in certain lands, was informed of all the facts affecting the title. An attorney acting for both parties, upon consideration of those facts, advised the parties that the defendant had a certain interest in the lands. The plaintiff acting upon that advice purchased the supposed interest. This advice being incorrect, *held*, that the mistake was one of law only, and the plaintiff could not recover the purchase-money.*

ACTION to recover money alleged to have been paid by mistake. The opinion states the facts. The plaintiff had judgment below.

Frank B. Van Valkenburgh, for appellants.

Cotshausen, Smith, Sylvester & Scheiber, for respondent.

ORTON, J. The separate appeals of the defendants will be decided together as one case.

Whatever may be the confusion and apparent contradictions of decisions elsewhere, the law is well settled and made definite and certain at least in this State, as to what constitutes a mistake of fact and a mistake of law; so that we have only to examine the facts in this case, and determine whether they make a case of mistake of fact within the decisions of this court, entitling the plaintiff to recover.

In 1868, Wilhelm Sindorf, being the owner in fee of the premises in question, deeded the same to Josephina Benstein. In this

* See note, 15 Am. Rep. 171.

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deed, the words, "and to the heirs and assigns of her heirs," were inserted in the granting clause ; and the words, "the party of the second part and her heirs, and to the heirs and assigns of her heirs," were inserted in the *habendum* and warranty clauses.

In 1873, Josephina Benstein died, leaving a will by which she devised all of her real estate to her daughter Johanna Benstein, subject to the payment of debts, and a legacy of two hundred and fifty dollars to each of her other six children ; and Johanna went into possession of said premises, and paid said debts and legacies, except the legacies of two of said children not yet of age.

The plaintiff states in his complaint, in substance, that being betrothed to Johanna, and she having been advised by her attorney, Nathan Pereles, an attorney at law, that her title to said land was held in common with each of the other children of Josephina, and that the said deed from Wilhelm Sindorf conveyed and gave to her mother only a life interest in the land, and at her death it descended in equal shares to her children, and they being Germans and not acquainted with the English language and with such questions of title, they advised with said Pereles, and he, *having produced the said deed*, advised them both substantially as above stated, in respect to said title, and that they ought to buy out such supposed interest of the other children, and that relying upon such advice, and the said Johanna not having the means to make such purchase, he, the plaintiff, made such purchase of the supposed interest of *Wilhelmina Schmitt*, one of the defendants, and one of said children and heirs of the said Josephina Benstein, and the said *Wilhelmina*, with her husband *Peter Schmitt*, joined with the other children in a warranty deed of said premises to the plaintiff and his intended wife, the said Johanna ; that said negotiation was made, and said deed was drawn, in the office and under the advice and supervision of said Pereles ; that plaintiff soon thereafter married with said Johanna, and when he ascertained that the said *Wilhelmina Schmitt* had no such supposed interest in said premises, and that the title in fee vested in said Josephina by the said deed of Wilhelm Sindorf, and that he had paid said money under a mistake as to the fact of the title to said premises, and that the *opinion* and *advice* of said Pereles were *erroneous*, he, the plaintiff, tendered the said defendants his deed of said premises, and demanded the payment back from them of the said seven hundred dollars and interest ; and the complaint avers "that he so paid

SPIERING V. ANDR  .

(45 Wis. 330.)

Slander and libel—words spoken of a magistrate—when slanderous.

falsely and maliciously calling a justice of the peace “a damned fool of a justice,” is slanderous in itself.

ACTION of slander. The complaint alleged that the plaintiff, being a justice of the peace, the defendant, in a public speech, falsely and maliciously said of him, “the reason I did not take out my second papers was, that I did not want to sit as a juror before such a damned fool of a justice.” No special damage was alleged. At the trial, the defendant objected to any evidence on the part of the plaintiff, because the words set out in the complaint were not actionable. The court sustained the objection and ordered judgment of nonsuit.

L. T. Fribert, for appellant.

S. W. Lamereaux with *J. B. Hays*, for respondent.

TAYLOR, J. The only question is, whether the words set out in the complaint are actionable *per se*. The complaint alleges that the words were spoken of the plaintiff as a justice of the peace, and we think this claim is sustained by the allegations of the complaint. The defendant does not simply say of the plaintiff that he is “a damned fool,” but that he did not want to sit as a juror before “such a damned fool of a justice.” It is clear that the defendant meant to be understood by this language, that he considered the plaintiff an unfit person to exercise the duties of a justice of the peace, on account of his ignorance and incapacity, and that the defendant purposely abstained from becoming a citizen of the United States that he might not be compelled to perform the duties of a juror in a court held by such a fool.

Starkie says: “Words are actionable, without proof of special damage, which directly tend to the prejudice of any one in his office, profession, trade or business.” Starkie on Slander, 110. In *Lansing v. Carpenter*, 9 Wis. 541, it is held that words spoken of

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an officer, which diminish public confidence in his official integrity and thus injure him in the business of his office, are actionable. In *Gottbriet v. Hubachek*, 36 Wis. 515, the same rule is repeated. The present chief justice, in the opinion, says: "We take it to be an elementary rule, that 'words are actionable which directly tend to the prejudice of any one in his office, profession, trade or business.'" That was an action brought for charging the chief engineer of the fire department of Racine with being drunk at a fire, which it was his duty to extinguish. The case of *Weil v. Altenhofen*, 26 Wis. 708, is not in conflict with these decisions. In that case, the words were not spoken of the plaintiff in his profession or business.

The words spoken by the defendant in the case at bar clearly and in most contemptuous terms charge the plaintiff with a want of capacity to perform properly the duties of his office, and directly tend to prejudice him therein. There are some cases which hold that words charging an officer with mere ignorance and want of capacity to perform the duties of his office are not actionable *per se*. Such was the opinion of Justice NORR, who delivered the opinion in the case of *Mayrant v. Richardson*, 1 N. & M. (S. C.) 347. We think, however, the great preponderance of authority is, that words charging an officer with gross ignorance and incapacity are actionable *per se*. Such is the opinion of Starkie. See his work on Slander (4th English ed.), 182 and 184. Townsend, in his work on the same subject, § 194, says: "It is said, however, that it is actionable to charge ignorance or unskillfulness, if it amounts to gross ignorance or unskillfulness. This seems only another mode of imputing such ignorance as unfits the person for the proper exercise of his art or with misconduct therein." Again, § 196, he says: "As regards language concerning one in office, the same general principles apply as to language concerning one in trade. Language concerning one in office, which imputes to him a want of integrity or misfeasance in his office, or a want of capacity, generally, to fulfill the duties of his office, or which is calculated to diminish public confidence in him, or charges him with the breach of some public trust, is actionable." The following are some of the cases which hold the words charging an officer with gross ignorance of the duties of his office or profession are actionable without alleging any special damage. *How v. Prin*, Holt, 653; *Byron v. Elmes*, 2 Salk. 694; *Day v. Buller*, 3 Wils. 59; *Onslow v. Horne*, id. 186; *Peard*

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v. *Jones*, Cro. Car. 382 ; *Moises v. Thornton*, 8 T. R. 303 ; *Baker v. Morfue*, 1 Sid. 327 ; *White v. Carroll*, 42 N. Y. 161 ; s. c., 1 Am. Rep. 503 ; *Robins v. Treadway*, 2 J. J. Marsh. 540. In the case of *White v. Carroll*, *supra*, the defendant, in speaking of the plaintiff as a physician, called him a "quack." Justice SUTHERLAND, in delivering the opinion of the court, says: "To call a physician a quack is in effect charging him with a want of the necessary knowledge and training to practice the system of medicine which he undertakes to practice. * * * There cannot be any doubt, I think, that to falsely and maliciously call a physician a quack is actionable."

Certainly the language used by the defendant imputed a want of capacity and ability on the part of the plaintiff to discharge properly the duties of his office, and was calculated, if believed by his hearers, to diminish public confidence in him as a justice.

We are not yet prepared to say that the citizen, in the exercise of his right to criticise the acts and qualifications of those holding office, may publicly make false and malicious charges as to their honesty, or their capacity to discharge the duties of the offices held by them. Though the citizen has the right to criticise those in office, and a just and truthful criticism may be a wholesome corrective of abuses of official positions, such criticism should be honest, and founded upon truth, and not falsehood.

BY THE COURT. The judgment of the Circuit Court is reversed and the cause remanded for a new trial.

Judgment reversed.

MELIA V. SIMMONS.

(45 Wis. 334.)

Jurisdiction — probate court administration on estate of living person.

Proceedings in a probate court, administering, settling and assigning the estate of a person, who, though represented to be dead, is still living, are absolutely void ; and a claim of title to land thereunder, with entry and occupation for ten years, is no bar to an action to recover such land. (See note, p. 749.)

EJECTMENT. The defense was founded on proceedings in the probate court, whereby the plaintiff's estate had been administered, settled, and assigned, as if he were dead, and upon ten

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years' occupation and claim of title thereunder. The plaintiff had judgment below.

E. C. Lewis and H. Barber, Jr., for appellants.

Hall & Skinner, for respondent.

ORTON, J. The proceedings of administration, settlement and assignment of the estate of the respondent, represented to have been dead, when he was and still is alive, are absolutely null and void for all purposes whatsoever.

The defense set up by virtue of section 6, ch. 117, R. S. 1858, that the said *Simmons* and his grantor had been in the continual occupation and possession of the premises in question for ten years, and that such grantor entered into such possession under claim of title exclusive of any other right, and founding such claim upon the judgment of some *competent court*, is not available in this case.

Whether the words "competent court," in this section, mean a court having jurisdiction of such a *class* of cases, as contended by the learned counsel of the appellant, or one having jurisdiction of this *particular* case, as contended by the learned counsel of the respondent, seems to be quite immaterial ; for the County Court of Dodge county, or any other court, had no jurisdiction in this particular case, or in such a class of cases. There is no *class* of cases which embraces the administration of the estates of living persons, as if they were dead. The proceedings are void *ab initio* and throughout. If this case falls within any class of cases, it is a class in which no court has any right to deliberate, or render any judgment, and in which every conceivable act is an absolute nullity. The only jurisdiction the County Court has, in respect to the administration of estates, is over the estates of *dead* persons.

It would seem that the bare statement of such a proposition is enough, without citing authorities ; but if any are necessary, those cited by the learned counsel of the respondent are amply sufficient. *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87 ; *Wales v. Willard*, 2 Mass. 120 ; *Smith v. Rice*, 11 id. 507 ; *Griffith v. Frazier*, 8 Cranch, 9 ; *Allen v. Dundas*, 3 T. R. 125.

In this case, the evidence shows that the grantor of the appellant *Simmons* did not enter into the possession of the premises under a claim of title founded upon the judgment of the County Court

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upon final settlement of the estate, but that he entered into such possession more than a year before he took the first step in the administration, probably claiming by descent; and therefore such possession cannot be adverse under the statute as an entry under such judgment. *Quinn v. Quinn*, 27 Wis. 168.

BY THE COURT. The judgment of the Circuit Court is affirmed, with costs.

Judgment affirmed.

NOTE BY THE REPORTER. — This decision is opposed to *Roderigas v. East River Savings Bank*, 63 N. Y. 460; s. c., 20 Am. Rep. 555. The subject was very learnedly examined by JONES, J., in *Boltun v. Jacks*, 6 Robt. 190, in an opinion of 46 pages. The court held that the want of jurisdiction rendered void the judgment of any court, whether of superior or inferior, general, limited or local jurisdiction, and in the absence of a statutory provision to the contrary the recital in the record of jurisdictional facts is not conclusive, but may be contradicted or impeached. In this case the claim of jurisdiction was resisted on the ground that the decedent at the time of his death was not an inhabitant of the county where the will was admitted to probate. The court review some of the authorities, and quote a dictum from *McPherson v. Cundiff*, 11 S. & R. 422, as follows: "If administration were taken out on the effects of a living man, or of one who died testate, the administration itself would be void, and there could be no administrator to act, no party before the court; consequently all the proceedings would be null. A probate of a will of a living person, or letters of administration on his effects, when a person is dead but left a will, is void, *ipso facto*, because there is no jurisdiction."

In *Allen v. Dundas*, 3 T. R. 125, it was decided that payment of money to an executor who has obtained probate of a forged will is a discharge to the debtor of the intestate, notwithstanding the probate is afterward declared null, and administration is granted to the intestate's next of kin. A probate, so long as it remains unrepealed, cannot be impeached in the temporal courts. ASHURST, J., *arguendo*, said: "The case of the probate of a supposed will during the life of the party may be distinguished from the present, because during his life the Ecclesiastical Court has no jurisdiction, nor can they inquire who is his representative; but when the party is dead it is within their jurisdiction." In like manner BULLER, J., said: "Then this case was compared to a supposed probate of a will of a living person; but in such a case the Ecclesiastical Court have no jurisdiction, and the probate can have no effect; their jurisdiction is only to grant probate of the wills of dead persons."

So in *Griffith v. Frazier*, 8 Cr., 9, MARSHALL, C. J., said: "In the common case of intestacy it is clear that letters of administration must be granted to some person by the ordinary; and though they should be granted to one not entitled by law, still the act is binding until annulled by the competent authority, because he had power to grant letters of administration in the case. But suppose administration to be granted on the estate of a person not really dead. The act, all will admit, is totally void. Yet the ordinary must always inquire and decide whether the person whose estate is to be committed to the estate of others be dead or in life. It is a branch of every cause in which letters of administration issue. Yet the decision of the ordinary that the person on whose estate he acts is dead, if the fact be otherwise, does not invest the person he may appoint with the character or powers of an administrator. The case in truth was one not within his jurisdiction. It was not one in which he had a right to deliberate. It was not committed to him by law. And although one of the points occurs in all cases proper for his tribunal, yet that point cannot bring the subject within his jurisdiction." This argument was quoted and approved, *obiter*, in *Fisk v. Norvel*, 9 Tex. 18.

The case of *Wales v. Willard*, 2 Mass. 120, is more nearly in point. The statute prohibited the granting of administration after the expiration of twenty years from the death. It was held that letters granted more than twenty years after the death were *ipso facto* void.

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PARSONS, C. J., said : "When the question before a judge of probate is only as to the manner of exercising his jurisdiction on a subject of which some court of probate has jurisdiction, there if he mistakes the means of correcting such mistake is by appeal. But when the question is whether the court of probate has jurisdiction of the subject or not, he must decide it, *but at his own peril*. If he errs by assuming a jurisdiction which does not belong to the probate court, his acts are void." This was an action of debt on a bond.

In *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87, the circumstances were substantially like those in the *Roderigas* case. The court approved *Wales v. Willard*, and laid stress on the dicta in *Allen v. Dundas*, and *Griffith v. Frazier*. They also referred to *Cutts v. Haskins*, 9 Mass. 543, where a grant of letters was held void because granted out of the county where the decedent resided ; and also the similar case of *Holyoke v. Haskins*, 5 Pick. 20, where the fact was also that letters were not granted until more than twenty years after the death. They said : "The point that the residence of the party deceased must necessarily have been before the probate court, and judicially acted upon, was pressed upon the court, but was not deemed sufficient to change the result. Upon the trial of this latter case a more full investigation of facts showed that the question of the domicile of the intestate was difficult to be satisfactorily established, but that fact had no effect upon the question of jurisdiction." The court also said : "If it be urged that a refusal to give conclusive effect to a decree of court appointing an administrator may operate most injuriously upon innocent parties who have acted in reference to them, and given to them full faith and credit, it may be replied that such is always the effect of holding judgments and decrees void for want of jurisdiction ;" and they also remark "how powerless this court is to throw protection around those who justify under a decree of a court of limited jurisdiction, which is shown as to the particular case to have had no jurisdiction."

In *Duncan v. Stewart*, 25 Ala. 408, the action was on a promissory note given to an administrator on his sale of a slave, the defendant having taken possession of the slave, and the slave having died before the maturity of the note. The court held that the purchaser not having rescinded the contract, nor offered to return the slave, could not avoid the note on the plea that the grant of letters of administration was void, because granted during the life of the alleged decedent. They also remark, *obiter* : "Although the main question in the case is one of first impression, we regard it as a very clear one. The party on whose estate the letters were granted was not dead, consequently the court acted without jurisdiction, and the administration was void." This case is cited and approved, *obiter*, in *Morgan v. Dodge*, 44 N. H. 259.

In *Appeal of Peebles*, 15 S. & R. 42, the court said, *obiter* : "A probate of a forged will of a living person is indeed an absolute nullity ; because the register has no jurisdiction, except in case of one who is dead. Such a probate, therefore, is distinguishable from one of a forged will, where the supposed testator is dead, for then the register has jurisdiction."

The decision in the *Roderigas* case excited a good deal of criticism at the time, and it is a matter of fair conjecture how much the subsequent decision of the same court in the same case was intended to retract or modify it. See 19 A. L. J. 358. The following is an abstract of the case. The opinion was delivered by CHURCH, C. J., and was unanimous, except that MILLER, J., concurred in the result.

In an action by this plaintiff as administratrix of her husband against this defendant, this court held that the payment by defendant, to Isabella McNeil, who had been appointed administratrix of the estate of her husband, was a bar, although it appeared that at the time of issuing letters of administration the husband was alive. 63 N. Y. 460. In this case the defendant sets up in bar payment of the moneys claimed by the plaintiff to Mrs. McNeil, who presented such letters upon plaintiff's estate. The facts are alike in both cases, except that here it was proved that Mrs. McNeil's petition for letters was never presented to the surrogate, and he never saw her, and never acted upon the petition nor knew of it, nor of the issuing of letters, but the letters were issued by his clerk, who used a blank which had been signed by the surrogate and left with him, and to which he attached the seal. The only proof of death in this case was the allegation in the petition, upon "the best of her knowledge, information and belief." *Held*, that the defense was unavailing. At common law, letters of administration upon the estate of a living person are void. *Jochumsen v. Suffolk Bank*, 3 Allen, 87 ; *Allen v. Dundas*, 3 T. R. 125 ; *Griffith v. Frazier*,

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8 Cranch, 9 ; *Melia v. Simmons*, 19 Alb. L. J. 198. When it appears that there was no judicial determination of the fact of death, it is difficult to support the grant of letters even to protect innocent persons. Proceedings of courts, especially of limited jurisdiction, may be attacked collaterally for want of jurisdiction over the subject-matter. If the court had jurisdiction, its exercise is conclusive, until reversed, however irregular or erroneous. If the surrogate has general jurisdiction of the subject-matter, his decision whether the case calls for its exercise or not is protected against collateral attack. 2 Cow. & Hill's Notes, 987. The surrogate has no jurisdiction to grant administration of estates of living persons. If the person is actually dead, the surrogate has jurisdiction over the subject-matter, and although he acts erroneously, his action cannot be collaterally impeached. Payment to an executor of a forged will is a valid discharge (*Allen v. Dundas*, 3 T. R. 125), because the court had jurisdiction, and its decision that the will was valid was good until reversed. By the former decision of this court the statute was held to extend the jurisdiction to issue letters so that they may be issued not only upon estates of dead persons, but upon estates of persons whom the surrogate should judicially determine to be dead. But here it is not sought to impeach the judgment of the surrogate, but only to show that he never acted, never exercised his judgment. It may be shown that his seal was forged (1 Wms. Ex. 489), and that the blank had been stolen and filled up by a third person. In this case the act of the clerk was at least unauthorized. The surrogate cannot delegate his judicial powers. *Powell v. Tuttle*, 3 Conist. 396 ; *Keeler v. Frost*, 22 Barb. 400. Either the plaintiff must have been dead, or the surrogate must have judicially so determined. Neither was true in fact ; there was no exercise of power ; and the letters are without any jurisdiction. Again, not only did the surrogate never act, but there was no proof that the plaintiff was dead. This fact would not have rendered the letters void, if the surrogate had really acted, *it seems*. The rule protecting the acts of ministerial officers (*Savacool v. Boughton*, 5 Wend. 170) has no application here. Nor was Mrs. McNeill a *de facto* administratrix, because the surrogate had no color of authority, having no jurisdiction. Administrators are not public officers, and the principle does not apply to them so fully as to public officers. *It seems*, that if the surrogate had held upon evidence that the plaintiff was dead, Mrs. McNeill would have been a *de facto* administratrix. The defendant is not the only innocent party ; the plaintiff is also innocent, and her property cannot be taken away without her consent and without authority of law.

In a note upon the *Roderigas* case, 15 Am. L. Reg. 212, Judge REDFIELD remarks : " The decision in this case is probably without a precedent, either in English or American jurisprudence, and the argument of the learned judge on the question of policy, that as attempts to administer upon the estates of living persons are likely to be rare, it is better such persons, having been adjudged to be dead, should be so treated, than that the numerous acts of their *quasi* representatives should be held void, might be apt to remind dissenting readers of the memorable instance of the high priest, who counselled that it was better for one innocent man to be put to death than that the whole nation should be kept in uproar. And still we cannot but see that there is really nothing intrinsically absurd in the decision when looked at merely upon the principles involved in it. It is only declaring probate courts in the State of New York to be courts of general jurisdiction, and entitled to the same conclusive presumption in favor of their jurisdiction which we apply to the Superior Courts of a State or nation, and to Superior Courts of record of general jurisdiction. This presumption within certain limits would no doubt prove salutary. There is no very good reason why the jurisdiction of courts of probate, so far as it depends upon domicile within a particular district within the State, should be allowed to be attacked collaterally, and all the proceedings rendered nugatory. But the decisions to this extent are very numerous, and have never been questioned, to our knowledge." " But when the rule of the conclusiveness of the records of probate courts comes to be applied not only to questions of jurisdiction, a class of cases to which to that extent it never has been applied before at all, but to be extended also to a case where no court could possibly obtain jurisdiction over the subject-matter, the very *casus belli*, or contingency upon which the jurisdiction attaches not having yet transpired, we may, as it seems to us, well demand some more compelling reasons for the extension than any presented by the learned judge in the principal case."

" When we come to find all this set aside and ignored by one of the ablest courts in the country, and the opposite views maintained and applied to a state of facts where no court

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could possibly claim jurisdiction any more than it could obtain jurisdiction of one who was never born, we must confess to a new sense of the uncertainty of the law."

The *American Law Review*, vol. 10, p. 787, comments less moderately on this case. The writer calls it "a most extraordinary decision," "contrary to both authority and principle," and says: "The proposition that a man cannot assert in court his own existence, because a court of probate has granted administration of his estate, supposing him to be dead, seems so preposterous that it would hardly be entitled to serious consideration if it had not been put forward by the highest court of the State of New York."

"It is easy to see, however, from the statement given of the statutes, that there is no substantial difference between the jurisdiction given by them and the jurisdiction exercised in the other States and in England in like cases. The surrogate is indeed required to ascertain the fact of the person's dying intestate before he grants administration; but this is no more than every court does, with more or less care, before appointing an administrator. It is an incidental fact to be proved; but the jurisdiction does not extend to making conclusive on all the world (including the man himself) that he is dead. It does not seem to be material whether the court granting administration is a court of general, or of special or limited jurisdiction. If the court were of general jurisdiction, and granted administration of the estate of a living person, the proceedings would still be void, because they could not have any application to the existing facts, and were therefore beyond the jurisdiction of the court."

The question was decided in *Lavin v. Emigrant Industrial Savings Bank*, U. S. Circ. Ct., S. D., New York, April 1, 1880, 9 Rep. 541. The facts were as follows: In 1865-66, John Lavin deposited, in the Emigrant Industrial Savings Bank in New York, \$400. In 1869 he went from Rhode Island, where he then lived, to California. In 1877 letters of administration on his estate were taken out from the probate court of Cranston, R. I., by John M. Brennan, who was also attorney for Lavin's brother, who claimed as next of kin. The statute of Rhode Island provides that if any person shall be absent from the State for the term of three years, without due proof of his being alive, administration may be granted upon his estate as if he were dead. In 1878 Brennan produced the letters before the surrogate of New York, and obtained ancillary letters. Upon the production of these the bank paid Brennan as the administrator of Lavin. In 1879 Lavin returned to New York and demanded his money. The bank refused to pay him. Suit was brought in the Circuit Court, the bank defending on the ground that it had been paid in good faith and in reliance upon the letters of administration. The court, CHASE, J., said: "These authorities would seem to be more than sufficient to establish the proposition that it is not competent for a State by a law to declare a judicial determination that a man is dead, made in his absence, and without any notice to or process issued against him, conclusive for the purpose of divesting him of his property, and of vesting it in an administrator for the benefit of his creditors, and next of kin, either absolutely or in favor of those only who innocently deal with such administrator. The immediate and necessary effect of such a law is to deprive him of his property, without any process of law whatever as against him, although it is done by process of law against other people, his next of kin, to whom notice is given. Such a statutory declaration of estoppel by a judgment, to which he is neither party nor privy, which has the immediate effect of divesting him of his property, is a direct violation of this constitutional guaranty. No such thing is known to the law as a judgment to which a person is neither a party nor a privy being conclusive against him. This has been repeatedly declared in the most emphatic terms by the Supreme Court of the United States." "These authorities show very clearly what are the essentials of 'due process of law' in reference to any judicial proceeding which directly or indirectly operates to deprive any person of his property, or its beneficial use or enjoyment, or the recovery of its possession in the courts. What is absolutely indispensable is that he shall have notice of the proceedings, either actual or in proper cases constructive by publication or by seizure of the thing itself; and that he shall have an opportunity to be heard in defense of his right or title. If the proceeding is wanting in these essentials, then, by the principles of the common law, whatever force and effect the judgment may otherwise have, it cannot bind him; he is not and cannot be treated as a party to the judgment without a violation of what is regarded as a fundamental rule of natural justice." "Applying this rule, all persons dealing with a person holding letters in a case like this must be held to

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know that the proof of death rests wholly on evidence not inconsistent with the fact of life, therefore, if the person is alive, the judgment of the surrogate that he is dead cannot be conclusive against him. There is, it seems to me, no element of estoppel in pais, because there is no deception or false representation of any fact. This mode of depriving a living person of his estate, by holding him concluded by the surrogate's decision that he is dead, has no support elsewhere in authority of the English or American courts, so far as shown. It has been by courts of the highest authority declared or treated as a legal impossibility. *Jochumsen v. Savings Bank*, 3 Allen, 87; *Allen v. Dundas*, 3 T. R. 125; *Griffith v. Frazier*, 8 Cranch, 9; *Mella v. Simmons*, 45 Wis. 334; *Morgan v. Dodge*, 44 N. H. 259; *Duncan v. Stewart*, 25 Ala. 408; *McPherson v. Cunliff*, 11 S. & R. 442; *Bolton v. Jacks*, 6 Robt. 190. See, also, 15 Am. L. Reg. 212. The present case seems to me to be fairly within the letter and the spirit of the constitutional guaranty. For these reasons it must be held that the proceeding taken under the laws of New York, which are set up as justifying defendant's refusal to pay to the plaintiff the amount of his deposits, is void as to him, because it would deprive him of his property without 'due process of law.'

CARHART V. HARSHAW.

(45 Wis. 340.)

Exempt property — voluntary conveyance of — effect of.

The owner of property exempt from execution may confer a clear and valid title to it by sale or gift, without regard to his motives, and although by a subsequent change in his circumstances he should become unable himself to hold it as exempt if he had retained the title. (*See note, p. 757.*)

REPLEVIN for books, seized by defendant as sheriff, by virtue of an execution against Rev. Dr. J. W. Carhart. The books had been the professional library of said Carhart, who was a clergyman, and he had made a gift of them to his minor children, the plaintiffs. The evidence showed that the plaintiffs, a girl and a boy, were respectively seventeen and twelve years of age; and carrying on a printing and bookselling business in their own name, before, at and after the times of the gift, and of the levy; and that they lived with their father and paid no board, but paid for their clothing from the proceeds of the printing office and book store. The defendant also offered to show that, at the time of such alleged gift, Dr. Carhart was, to plaintiffs' knowledge, in debt beyond his means to pay; but the evidence was ruled out. Other facts appear in the opinion. The plaintiffs had judgment.

Hooper & Buxton, for appellant. The court erred in charging that a debtor has a right to sell or donate exempt property, and

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that it is immaterial whether or not, in so doing, he designs to defraud creditors. The true doctrine is, that the transfer of exempt property is voidable for fraud, but where, if the transfer is avoided for the fraud, the property will *still remain exempt in the hands of the debtor*, the court will not interfere. *Dreutzer v. Bell*, 11 Wis. 114; *Barker v. Dayton*, 28 id. 367, 382; *Hibben v. Soyer*, 33 id. 322; *Anthony v. Wade*, 1 Bush, 110; *Knevan v. Specker*, 11 id. 3; *Lishy v. Perry*, 6 id. 515; *Herschfeldt v. George*, 6 Mich. 456; *Smith v. Rumsey*, 33 id. 190; *Stevenson v. White*, 5 Allen, 148, 149; *Rayner v. Whicher*, 6 id. 294; *Mannan v. Merritt*, 11 id. 582; *Beals v. Clark*, 13 Gray, 18; *Piper v. Johnston*, 12 Minn. 60; *Woodworth v. Paige*, 5 Ohio St. 70; *Cox v. Shropshire*, 25 Tex. 113; *Currier v. Sutherland*, 54 N. H. 475; s. c., 20 Am. Rep. 143; *Getsler v. Saroni*, 18 Ill. 511; *Chambers v. Sallie*, 29 Ark. 407.

Hauser & Colman, for respondents.

COLL, J. Notwithstanding the ingenious criticisms of the acute and learned counsel for the defendant upon the charge of the Circuit Court, a majority of the court think there was nothing in the charge which could have misled the jury to the prejudice of his client. The portion of the charge to which the first exception was taken reads as follows: "I say to you as a proposition of law, it being conceded that they were exempt as his library, that he had the right to sell them for a valuable consideration to any one, and that when sold for a valuable consideration to a purchaser, they were still not liable to seizure and sale upon execution for his debts." It was a conceded fact in the case that the library in question was Dr. Carhart's professional library at the time he claimed to have given it to his children, the plaintiffs in the action, and that he might then have held it as exempt by statute as his private library. But it is objected that the above charge was not applicable to the facts, and was likely to mislead the jury, because there was no pretense of a sale of the library for a valuable consideration. It is certainly true that the plaintiffs claimed the library by way of gift, and not by purchase from their father. But in the charge, as well as in some of the instructions asked by defendant, it was assumed that a transfer by gift and one by sale are subject to and controlled by the same rules of law, and this doubtless will account for this language in the charge. For instance, in the sixth request asked by the defendant we find these words: "The question for the

jury to determine is, Was this sale, or transfer by gift, fraudulent and void as to existing creditors," etc. The same form of expression is used in the second request, where the transfer is spoken of as a sale. So, while it may be true that the plaintiffs did not claim to have purchased the library, yet it seems impossible that the jury could have been misled by what the court said in regard to a sale. In the same connection the court added this: "He (Dr. Carhart) also had the right to donate them for a consideration, and the love and affection which the law assumes he bears for his children is a sufficient consideration. He had the right, then, in consideration of his love and affection for his children, to donate them to his children, give them to them, and if that gift for this consideration was followed by a manual actual delivery of the property to his children, it was still, and continued to be, not liable to seizure and sale upon execution by creditors. So that I have taken away from your consideration all questions of fraudulent transfers, so far as the sale or gift to his children is concerned." Also, in the subsequent part of the charge, the court made use of this language: "Therefore I say, if you find there was a gift of these books to his children, followed by a manual actual delivery, in consideration of the love and affection which the law presumes the parent bears to the child, it is a good transfer, and thereafter the property is not liable for his debts any more than it was prior to the date of the gift." These portions of the charge were likewise excepted to. Now the idea advanced or proposition laid down in this charge, as we understand it, is this: A parent may, in consideration of love and affection, make a valid gift of exempt property to his child, and when the gift is completed by a manual delivery of the property, the child will hold it as against the creditors of the parent. In case of non-exempt property, the debtor would not be permitted to make such a disposition of his property to the prejudice of the rights of his creditors. The law requires a man to be just before he is generous, and the fact that the transfer was without consideration would be deemed a strong, if not a conclusive, badge of fraud. But in case of exempt property, which the creditor has no right in law to subject to the payment of his debts, the rule is otherwise. In respect to such property, the parent may, in consideration of love and affection, donate it to his child; and where the gift is followed by actual manual delivery of the property to the child, it is placed beyond the reach of the creditors of the par-

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ent. In other words, fraud cannot be imputed to such a transfer of property merely because it is voluntary or without consideration. This is the meaning of the charge, as we understand it; and with this interpretation it is not fairly open to criticism. The court is evidently speaking of a sale or gift of exempt property which actually passes the title and ownership to the vendee or donee as against the parent, and where the child is clothed with full dominion and control of the property.

There is another passage in the charge, which was excepted to, and which was much commented upon in the argument made by defendant's counsel. It is the following: "Being so exempt, I say to you, the law is, he had the right to sell them, he had the right to donate them, and it is perfectly immaterial whether he designed to defraud creditors or not; the property being exempt, the disposal of them could not defraud the creditors, because the creditors had no right to them." This, it is said, was equivalent to laying down the broad, naked proposition, that in no case, under no circumstances, can fraud as against the creditor be predicated upon a transfer of exempt property by a debtor. So that it would logically follow from this doctrine, that if an unscrupulous debtor should make a mere colorable sale or gift of exempt property to a friend, to be held in secret trust for his own use, then acquire additional exempt property as far as the funds of his creditors in his hands would enable him to do, and make a like disposition of it to another friend, to be held in the same manner, and continue these transactions indefinitely, he could always cover up his property and keep it from his creditors. This is not a fair inference or deduction from the charge, nor does the doctrine laid down by the Circuit Court lead to any such mischievous and absurd consequences. All through the charge the court is treating of an absolute sale or gift, not a mere colorable one; of a sale or gift where the title and ownership of the property passes to the vendee or donee. It is the same as though the court had told the jury that a debtor has the right to make an absolute sale or gift of exempt property to a child or friend, and that the motive with which such a transfer was made was immaterial, or of no consequence to his creditor. The doctrine of the charge is the same in principle as that stated by Mr. Justice PAINE in *Pike v. Miles*, 23 Wis. 164, when considering the effect of a conveyance by the husband to his wife of the homestead. He says that such a "conveyance cannot be held fraudulent as to

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creditors, for the reason that being exempt, it was no more beyond their reach after the conveyance than before." Substantially the same thing is said in *Bond v. Seymour*, 2 Pin. 105, and *Dreutzer v. Bell*, 11 Wis. 118. The following authorities are to the same effect: *Murphy v. Crouch*, 24 Wis. 365; *Hibben v. Soyer*, 33 id. 319; *Smith v. Rumsey*, 33 Mich. 183; *Smith v. Allen*, 39 Miss. 469; *Edmonson v. Meacham*, 50 id. 34; *Crummen v. Bennet*, 68 N. C. 494; *Duvall v. Rollins*, 71 id. 218; *Danforth v. Beattie*, 43 Vt. 138; *Lisky v. Perry*, 6 Bush, 515; *Knevan v. Specker*, 11 id. 1; *Sears v. Hanks*, 14 Ohio St. 298; *Mannan v. Merritt*, 11 Allen, 582; *Cox v. Wilder*, 2 Dill. 45. It is claimed that the principle to be extracted from these and other like cases goes only to this extent, that a transfer of exempt property will not be held void as a fraud upon creditors when the effect of such determination will be to put the property in the hands of the fraudulent vendor still exempt; but if the circumstances of the debtor have so changed that he could no longer hold it as exempt if the sale were set aside, then the transfer will be avoided for fraud at the instance of the creditor. It seems to us the true test is, was the sale, or gift, valid when made? If the ownership and title then pass absolutely from the debtor, so that he cannot afterward have or claim any benefit from it, the transfer is unimpeachable on the part of creditors. In this case, it is said that while Dr. Carhart might hold the library as exempt as a professional library, he had no right, under the color of a pretended gift of it to his children, to hold it as merchandise for sale. The Circuit Court did not rule that he had the right to hold it in that manner. On the contrary, in another place the court charged that if the store was Dr. Carhart's, carried on for his benefit, he being the owner of the property, the books in trade, but was carried on in the name of his children, as a cover to keep the property from his creditors, then the books were liable to sale on execution. This charge was also criticised on the argument, though no exception was taken to it, because the question was submitted whether the store belonged to Dr. Carhart, when there was no claim or pretense that it did. But the court likewise submitted the question whether Dr. Carhart owned the property or books in trade. And while the evidence showed that the plaintiff had in the store other books for sale besides those they had received from their father, yet the meaning of the charge is plain. As there is no legal restraint upon the debtor against selling or even giving away his exempt property, we

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cannot see that the motive with which he does it is material, so long as there is no secret trust in his favor.

Our views upon the controlling question in the case render it unnecessary to notice specifically the refusal to give the instructions asked by the defendants. The judgment of the Circuit Court must be affirmed.

Judgment affirmed.

RYAN, C. J., dissenting.

NOTE BY THE REPORTER.—The authorities cited in the principal case are all to the doctrine that the setting aside of a conveyance for fraud, at the suit of the husband's creditors, does not estop a wife from claiming a homestead in the premises. To the same effect are *McFarland v. Goodman*, 6 Blas. 111; *Wood v. Chambers*, 20 Tex. 254; *Vogler v. Montgomery*, 54 Mo. 577; *Huginn v. Dewey*, 20 Iowa, 368; *Muller v. Inderreiden*, 79 Ill. 382; *White v. Givens*, 29 La. Ann. 571. But to the contrary, see *Piper v. Johnston*, 12 Minn. 60; *Chambers v. Sallie*, 29 Ark. 407; *Huey's Appeal*, 29 Penn. St. 219; *Currier v. Sutherland*, 54 N. H. 478; s. c., 20 Am. Rep. 143, and note, 150.

In a note on the principal case, 19 Am. L. Reg. (N. S.) 29, Mr. EWELL says: "As to fraudulent dispositions chattels exempt from sale on execution, it would seem clear that the same principles should prevail; and so many of the cases hold," &c. as above mentioned concerning homesteads. Citing *Vaughan v. Thompson*, 17 Ill. 78; *Cole v. Green*, 21 Id. 103; *McCord v. Moore*, 5 Helsk. 734; *Calloway v. Carpenter*, 10 Ala. 500; *Wilcox v. Hawley*, 31 N. Y. 648; *Hetrick v. Campbell*, 14 Penn. 263; *Duvall v. Rollins*, 68 N. C. 220; s. c., 71 Id. 221; *Mowely v. Anderson*, 40 Miss. 49; *Megehe v. Draper*, 21 Mc. 510; *Anthony v. Wade*, 1 Bush, 110; *Patten v. Smith*, 4 Conn. 450; *Tracy v. Cover*, 28 Ohio St. 61. "The contrary is however held more or less distinctly by a considerable number of cases. See *Cook v. Scott*, 1 Gilm. 344; *Cassell v. Williams*, 12 Ill. 390; *Diefenderfer v. Fisher*, 3 Grant's Cas. 30; *Freeman v. Smith*, 80 Penn. St. 284; *Gilleland v. Rhoads*, 24 Id. 187; *Smith v. Emerson*, 43 Id. 456; *Emerson v. Smith*, 51 Id. 80; *Strouse v. Becker*, 38 Id. 190; *Larkin v. McAnnally*, 5 Phila. 17; *Carl v. Smith*, 8 Id. 569; *Mandrove v. Burton*, 1 Ind. 39; *Sugg v. Tillman*, 2 Swan, 206; *Byrd v. Curlin*, 1 Humph. 406; *Brackett v. Watkins*, 21 Wend. 66."

SHERWOOD V. SHERWOOD

(45 Wis. 357)

Will — action to correct — evidence — extrinsic in construing will.

A complaint alleged that a testator, at the time of making his will, and thereafter until his death, owned lot 10 in a certain block; that the plaintiff at those times ever since owned, in fee simple, lot 9 in the same block; that by said will the testator devised said lot 10 to plaintiff; but that in drawing the will, lot 10 was by mistake described as lot 9; that the will contained *no other mention or description of said lot 10*; and that at the time of the making of said will plaintiff was, and ever since has been, in the actual possession of said lot 10. *Held*, on demurrer, that there was nothing in the will, as thus described, upon which to base a construction of it as devising lot 10 to plaintiff.

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ACTION to correct a will and remove cloud from title. The complaint alleged that Daniel O. Sherwood, the son of the plaintiff, died, leaving his last will and testament, by which he devised to the plaintiff lot 10 in block 20 in the city of Oshkosh, of which lot he was the owner in fee when he made his will, and continued such owner until his death; and that said will was duly admitted to probate by the proper court. The complaint then alleged:

“That in drawing said will there was a mistake made in drafting and drawing the same, in describing said lot 10, block 20, and the same was, through error and mistake, described therein as lot 9, being the lot owned by the plaintiff; that the said Daniel O. Sherwood, in said will and testament, gave and bequeathed to the plaintiff said lot 10, but by mistake the same was erroneously described as lot 9 in said will; and that in and by said will the said Daniel O. Sherwood made no other mention or description of said lot 10, or of any lot or land in said block 20, except as herein stated; and that plaintiff, at the time of the making of said will and testament, and at the time of the decease of said Daniel O. Sherwood, was, and has been ever since, the owner in fee simple of lot 9 in said block 20, which adjoined said lot 10; and that at the time of making said will and testament the plaintiff was, and ever since has been, in the actual possession of said lot 10, and no party or person has, since the death of her said son Daniel Sherwood, made any claim to said lot or claimed to have any interest therein, until about one year ago, when such mistake in such description was first discovered, and was first known to the plaintiff or any other party or person.”

Other facts appear in the opinion. The plaintiff had judgment below on demurrer.

Charles W. Felker, for appellant.

Gabe Bouck, for respondent. A court of equity may correct mere mistakes in a will. *Wood v. White*, 32 Me. 340; *First Parish v. Cole*, 3 Pick. 237, and cases cited in note; *Minot v. Boston Asylum*, 7 Metc. 416; *Winkley v. Kaine*, 32 N. H. 268; *The Domestic, etc., Appeal*, 30 Penn. St. 425; *Riggs v. Meyers*, 20 Mo. 239; *Allen v. Lyons*, 2 Wash. C. C. 475; *Powell v. Biddle*, 2 Dall. 70; s. c., 1 Am. Dec. 263; *Selwood v. Mildmay*, 3 Ves. 306; *Door v. Geary*, 1 Ves. Sr. 255; *Anstee v. Nelms*, 38 Eng. L. & E. 314; *Charter v.*

Sherwood v. Sherwood.

Charter, 1 Eng. R. 249; Kerr on Fraud, 448, and notes; Jarman on Wills, *330, *363, *372.

LYON, J. This is substantially an action to remove a cloud from the plaintiff's title to lot 10 in block 20 in the city of Oshkosh, which the plaintiff alleges in her complaint was devised to her by her son, the late Daniel O. Sherwood, in and by his last will and testament, which since his death has been duly admitted to probate. The cloud is alleged to have been produced by the fact that in said will the lot is misdescribed as lot 9 in block 20. It is further alleged that the defendant claims to be the owner of an undivided one-half of lot 10; and facts are stated, showing that his claim is valid, if the lot is intestate estate. The plaintiff prays that the cloud may be removed by correcting the alleged misdescription in the will, and by the judgment of the court that lot 10 is therein devised to the plaintiff notwithstanding such misdescription. Either of these modes, if adopted, will operate to quiet and confirm the plaintiff's title to lot 10.

I. An extended examination of the cases and authorities bearing on the question, not only those cited by both of the learned counsel, but many others not cited, has satisfied us that it is not a proper exercise of the powers of a court of equity to reform a will by adding provisions thereto to make the will accord with the real intentions of the testator.

We have seen but a single case in which a court has assumed to correct a mistake in a will. That is the case of *Wood v. White*, 32 Me. 340. The will contained this bequest: "I give to J. Wood, of Belfast, the whole amount, principal and interest, he may owe me at the time of my decease, which is secured to me by mortgage," etc. The facts were, that no person named J. Wood owed the testator, or ever had any dealings with him, or claimed the legacy. The complainant, George Wood, of Belfast, was married to the testator's niece, was his warm personal friend, and owed him a debt secured by mortgage. The executors, who were defendants in the action, answered admitting that the testator intended George instead of J. Wood, and did not contest the action. Besides, it appeared that the testator, when abroad, had addressed letters to the complainant by the name of J. Wood. On these facts the court decreed that the will be corrected. The opinion contains neither argument nor reference to authority, and the cases cited to

support the decree do not support it. The case was probably a proper one for construing the will as containing a legacy to George Wood; but the decision is of little value as authority for reforming wills.

Judge STORY says, in a general way, that courts of equity have jurisdiction to correct wills; but it is apparent from his discussion of the subject and the cases which he cites, that he does not mean that the court will reform and change the language of a will, but that it will carry out the intention of the testator in a proper case by giving construction to the words of the will in accordance with such intention. He says: "In regard to mistakes in wills, there is no doubt that courts of equity have jurisdiction to correct them *when they are apparent on the face of the will, or may be made out by a due construction of its terms*; for in cases of wills the intention will prevail over the words. But then the mistake must be apparent on the face of the will, otherwise there can be no relief." 1 Eq. Jur., § 179. And in supplemental § 180 a, by Judge REDFIELD, it is laid down that the American courts have not interfered to correct alleged mistakes in wills. A similar statement will be found in 1 Redf. on Wills, 571.

The reason why courts of equity will not interfere in such cases seems to be, that an action to reform a written instrument is in the nature of an action for specific performance, and the making of a will being a voluntary act, there is no consideration, as in actions to reform deeds or contracts, to support the action. Hence it is said in a note by the editor of Wigram's treatise on Extrinsic Evidence in aid of wills, that "volunteers under wills have no equity whereon to found a suit for specific performance." O'Hara's 2d Am. ed. 47.

There is another reason why a court of equity should not reform a will by correcting a mistake therein, after the will has been admitted to probate. Such probate is the judgment of the court that the instrument, just as it is written, is the last will and testament of the testator; and on well settled principles that judgment cannot be attacked collaterally. While the judgment of the proper court admitting the will to probate remains in force, no court is authorized, in the absence of fraud, to adjudge that the instrument, or any of its provisions, is not the will of the testator. Neither can it add provisions not written in the will. It can only construe the instrument as it is written.

To avoid possible danger of misapprehension, it may be remarked that it is probably competent for the probate court to reject any portion of an instrument propounded as a will, on proof that such portion was inserted therein against the desire or without the knowledge of the testator, and to admit the residue to probate. For this purpose, extrinsic evidence of the intention of the testator is necessarily admissible. The rule is, that if the question is one of fraud, or undue influence (which is a species of fraud), or *devisavit vel non*, any relevant parol evidence is admissible. But it would seem that the latter question can only arise before the will is probated, while the question of fraud may be tried at any time when rights are claimed under the will, whether the claim be made at law or in equity.

The principle of the above rule is obvious. The probate court having jurisdiction to determine that the whole instrument is or is not the last will of the person who is alleged to have made it, must logically have the power to determine, on proper proofs, that a portion thereof is his last will, and the residue is not. But the rule does not authorize the probate court, or any other court, to supply omissions in the will; for that would be to make a will for the testator which he has not made for himself in the form essential to its validity. On this general subject see O'Hara's notes above cited, p. 281, Wigram's Treatise, and cases cited.

II. The remaining question is, whether the will admits of the construction that the testator therein devised lot 10 to the plaintiff. One of the rules by which this question must be determined is, that evidence of the intention of the testator, extrinsic to the will itself, is not admissible for the purpose of explaining, construing or adding to the terms of a will; but such intention must be spelled out from the words of the will itself, read in the light of the circumstances surrounding the testator when he made it. In cases where there are inconsistent provisions in the will, evidence of such circumstances is always admissible.

The above rule excluding extrinsic evidence of the intention of the testator has been applied in a large number of cases in which such evidence has been offered to vary or contradict wills, to supply omissions or correct mistakes there, or to explain patent ambiguities. Wigram lays down the rule as follows: "If a testator's words, aided by the light derived from the circumstances with reference to which they were used, do not express the intention

ascribed to him, evidence to prove the sense in which he intended to use them is, as a general proposition, inadmissible; in other words, the judgment of a court in expounding a will must be simply *declaratory* of what is *in* the will." P. 179. Numerous English cases illustrating the application of the rule are cited in note 2 p. 182 of the treatise above cited.

In *Morgan v. Burrows*, *ante*, p. 211,* such evidence was held admissible to explain a latent ambiguity; and the distinction is there considered between such a case and those cases which are within the rule. Many American cases in which the rule has been applied will be found cited in the brief of counsel for the appellant in that case.

We are now to determine whether there is any provision or clause in the will under consideration, from which, when considered in the light of surrounding circumstances, the court can say that it contains a devise to the plaintiff of lot 10. Inasmuch as the question arises on demurrer to the complaint, we have no knowledge of the contents of the will beyond what is stated in the complaint. It is averred therein that by mistake lot 9 is the lot described in the will instead of lot 10, and that the testator "made no other mention or description of lot 10, or of any lot of land in said block 20, except as herein stated." Thus it is substantially alleged that the only designation or description in the will of the lot devised to the plaintiff is "lot 9." Hence there is nothing in the will upon which to predicate a construction that lot 10 was therein devised to her.

It might be well otherwise had the testator inserted in his will any other description or identification of the lot which he intended to devise to the plaintiff. For instance, had he devised to her "lot 9 in block 20, occupied by A.;" or, "which I purchased of B.;" or even "*my* lot 9 in block 20," and had it appeared that lot 10 alone was occupied by A., or that the testator purchased lot 10 alone of B., or that lot 10 was the only lot owned by the testator in block 20, in either case extrinsic evidence would be admissible to show the fact; and if established, the court would be justified in construing the will as containing a devise to the plaintiff of lot 10. This does not contravene the rule which rejects extrinsic evidence of the intention of the testator when offered to vary or add to a will; for in either of the cases above supposed the will itself contains two inconsistent descriptions of the lot devised, the one true and the

*See *ante*, p. 717.

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other false; and the court would merely resort to extrinsic evidence to ascertain which was the true description, and would construe the will accordingly. This is but an application of the familiar maxim, *falsa demonstratio non nocet*, sanctioned by all of the authorities. Nearly all of the cases cited by the learned counsel for the plaintiff sustain these views.

We have not overlooked the averment in the complaint that the misdescription of the lot devised to the plaintiff is apparent on the face of the will. No clause of the will which will support the averment is referred to in the complaint, and we must regard it as a mere conclusion of law from facts not pleaded. It is a familiar rule that such an averment is not confessed by a demurrer to the pleading in which it is inserted.

III. The learned counsel for the defendant claimed in argument, that it appears by the complaint that the plaintiff has been guilty of laches, and hence can have no relief in a court of equity. We think that question is not in the case; and if it is, we think the complaint fails to show any unreasonable delay to bring this action.

Our conclusion upon the whole case is, that the complaint in its present form does not state a cause of action, and that the demurrer thereto should have been sustained.

BY THE COURT. Order reversed, and cause remanded for further proceedings according to law.

RYAN, C. J., took no part.

Order reversed and cause remanded.

CORBETT V. CLARK.

(45 Wis. 403)

Negotiable instruments — what constitutes bill of exchange.

A. and B., cultivating on shares the farm of C. and D., partners, gave E., a creditor of A. and B., an order to C. & D. to pay a sum of money to E. and "take the same out of our share of the grain," referring to grain raised by A. and B. on the farm in question. C. & D. wrote "order accepted" on the back of the instrument, and signed their firm name. *Held*, that the order was a valid bill of exchange: not payable out of a particular fund, nor conditional; and that C. & D. could not defend on the ground, that before

acceptance they had made advances to A. and B. on the faith of their share of the grain, to an amount larger than its value, as was known to E. at the time of acceptance.*

ACTION on an accepted order. The opinion states the facts. The plaintiff had judgment below.

Shepard & Shepard, for appellants. The instrument in question was not negotiable: (1) Because it did not run to the order of any one, or to bearer. *Gerard v. La Coste*, 1 Dal. 194; 1 Am. L. C. (3d ed.), 321-2; *Carruth v. Walker*, 8 Wis. 252. (2) Because it was a request to pay, not absolutely and in any event, but out of a particular fund designated. *Munger v. Shannon*, 61 N. Y. 251; *Cook v. Satterlee*, 6 Cow. 108; 1 Am. L. C. 317-18. Non negotiable instruments are subject to the defense that there was nothing due the payee at the time when notice of the transfer came to the maker. 1 Pars. on Notes & Bills, 14, 15; 2 id. 44-47. The acceptance was in law conditional, the order itself being so. 1 Pars. on Notes & Bills, 304; *Atkinson v. Manks*, 1 Cow. 691.

Geo. P. Knowles, for respondent.

ORTON, J. This action is brought by the payee, the respondent, against the drawees, the appellants, upon the following instrument:

“GREENBUSH, WIS., Sept. 20, 1875.

Mr. I. B. CLARK & Co.: Please pay *C. A. Corbett* one hundred and eighty-three dollars and 90-100, and take the same out of our share of the grain.”

On the same day, the drawees wrote upon the back of this order the words, “Order accepted,” and signed the same, by their firm name of “*Clark & Thorp*.”

This acceptance in itself is unqualified and absolute, but of course it must be held to be subject to any qualifications or conditions, if any, which appear upon the face of the order; and it is contended by the learned counsel of the appellants, that the words, “and take the same out of our share of the grain,” qualify the acceptance and make the order payable out of a distinct and specified fund, and conditional upon the sufficiency of such fund. These words, without explanation, are meaningless; but to give the

* Compare *Jones v. Pacific, etc., Co.* (13 Nev. 359), 29 Am. Rep. 303.

appellants the full benefit of their explanation by the facts set up in their answer and found by the Circuit Court, it may be said that the appellants had rented to the drawers of said order two farms, and, by the terms of the lease, each party was to have one-half of the produce raised upon said farms for the years 1875 and 1876, and the appellants were to have a lien upon the share of the lessees for any advances made or credits allowed by the appellants to them, or debts incurred to the appellants by them, in and by the working of the farms, and for seed and certain fall plowing. The drawers of the order had gone into possession of the farms; and when the order was drawn, the produce of the same was either harvested or growing, and they had no other means to pay their debts except their share of the same, besides which they were insolvent. The appellants, at the date of the order, had claims against the drawers' share of the produce, according to the terms of the lease, of an uncertain amount, but probably considerably less than said share, and had also become the holders of a certain chattel mortgage upon the half share of the half share of the said drawers, belonging to one of said drawers to secure his individual note for \$323, besides interest, to become due December 28, 1875; which mortgage also covered some other property.

It is claimed by the appellants that their advances under said lease, together with the said note and mortgage, more than covered the entire amount of said half share of the produce raised upon said farms for the year 1875, and that the respondent, the payee of said order, had knowledge of these facts, and that the words in the order, "take the same out of our share of the grain," mean said share already anticipated and absorbed by these other claims.

This bill is not drawn with words of negotiability, but "it is not essential to the validity of a bill of exchange that it should be made payable to order, or bearer, or have the words, 'value received.'" *Mehlberg v. Tisher*, 24 Wis. 607. This order, then, has all the essential elements of a bill of exchange, unless the above words make it payable out of a particular fund and conditionally, and qualify the acceptance.

We do not think they can have this effect, even with the explanation given in the answer and finding. This question must be determined by the rule, that if these or similar words are used "merely to designate the fund out of which the acceptor may reimburse himself," or "as mere reference in the draft to the fund

to call the attention of the drawee to his means of reimbursement," then the order and acceptance are absolute and unconditional; but if they are used to limit the payment, or make the order payable only out of a particular fund, or conditionally, or upon a contingency, then the order is not a bill of exchange, and the acceptance *alone* is not a sufficient cause of action, even between the original parties. Story's Bills of Ex., § 40:

Perhaps a better test as to whether an order with such or similar words is a bill of exchange is found under the above reference. "The general rule is, that a bill of exchange always implies a personal general credit, not limited or applicable to particular circumstances and events which cannot be known to the holder of the bill in the general course of its negotiation." The vague and by themselves meaningless words here used, as we shall see, cannot affect the original payee after an unqualified acceptance; much less would they affect subsequent holders of the bill chargeable *only* with notice of the words themselves.

By the above test there would seem to be no question that this order is to be treated as an unconditional and absolute bill of exchange.

Where the words in the body of the order are obscure, ambiguous or uncertain, and it may be doubtful whether they should be construed to make the pay conditional, contingent or limited by a particular fund, or as a mere direction as to the fund out of which the drawee may be reimbursed, there it would seem to be the duty of the drawee, in his acceptance, to clearly express such a condition or qualification. *Sproat v. Matthews*, 1 T. R. 182; Story's Bills of Ex., § 240. But by the authorities, which are from cases nearly parallel, there can be no doubt that this instrument should be classed as a bill of exchange. In *Redman v. Adams*, 51 Me. 433, the words of the clause were, "and charge the same against whatever amount may be due from my share of fish caught on board schooner 'Morning Star,' for the following year, 1860." The acceptance was general; and the court held that "this was a mere reference to the fund in the draft, to call the attention of the drawee to his means of reimbursement," and that the "payment of the order was not made to depend upon his having any share of the fish, nor was the call limited to the proceeds thereof." *Macleed v. Snee*, 2 Stra. 762, the order was, "Pay £9 19s as my quarterly half pay to be due from 24th of June to 27th of September next by advance;" and the court say: "The mention of the half pay is only by way of direc-

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tion how he shall reimburse himself, but money is still to be advanced on the credit of the person ;” and the court distinguishes such a case from *Josselyn v. Lacier*, 10 Mod. 294, and *Jenney v. Herle*, 1 Str. 591, where the orders were drawn upon particular and uncertain funds, and no personal credit is given to the drawer. In *Haussoullier v. Hartsinck*, 7 T. R. 733, the words in the note were, “being a portion of value as under, deposited in security for the payment hereof,” and the collateral was appended to the note; and it was held the note was payable at all events, and that the payment when made, was to be carried to a particular account.

Where the clause merely indicates the account to which the transaction is to be carried, or the fund from which the drawee is to reimburse himself, and the acceptance is general, it does not affect the validity of the order as a bill of exchange. *Kelley v. Mayor, etc., of Brooklyn*, 4 Hill, 263; *Early v. McCart*, 2 Dana, 414. In *Spurgin v. McPheeters*, 42 Ind. 527, the order was: “Pay to Jesse McPheeters or order the sum of one hundred and nineteen dollars, on said bill of 1 3-4 in lumber, and oblige,” etc. The answer set up that the order was given for past indebtedness; that the drawers were insolvent; that the drawee had a contract with the drawers for the delivery of 1 1-2 inch lumber on the cars, and to be paid for when 30,000 feet of such lumber was so delivered, and not till then; the said lumber had not been so delivered; that the order was drawn and accepted with reference to said contract; and that all the facts were within the knowledge of the payee at the time of the acceptance, and it was understood at the time that the order was not to be paid until the performance of said contract. The acceptance was simply, “I accept.” The action was by the payee against the acceptor. On demurrer to the answer, it was held that the acceptance being general, it could not be contradicted or explained by a contemporaneous verbal agreement; that the consideration of the bill could not be inquired into as between the acceptor and the payee; and that showing that it was given for an antecedent debt, or as an accommodation, was no defense. In *Sylvester v. Staples*, 44 Me. 496, the order was, “Pay Ansel T. Sylvester fifty-five dollars for work done on logs,” etc. The acceptance was, “I accept the written order, to pay when due.” On the trial of the action, by the payee against the acceptor, the defendant offered to show by parol evidence that the words “to pay when due” were understood by the parties and agreed to mean, when the acceptor should have

funds in his hands belonging to the drawer, "for work done on logs," and that at the time of the acceptance there was nothing so due, and had not since been due; and the offer was refused, and the evidence rejected, on the ground that the acceptance was general, and the words could have no other construction than to mean to pay when the *order* was due, or at the maturity of the order, and that parol evidence was not admissible to contradict or explain either the order or acceptance. The objection was made that the order had no words of negotiability, as in this case, and was therefore no bill of exchange, and that it was open to explanation and defenses of this character. It was held that the order was a bill of exchange, and that the exclusion of the evidence offered to show any contemporaneous agreement between the parties contradicting or varying the terms of the order or the acceptance was correct, and that the words of the acceptance must be taken most strongly against the acceptor.

In addition to the elementary principles and first impressions based upon the reason supporting such principles in application to this peculiar form of order, I have referred to the foregoing cases, which appear to be very much in point, and given to them considerable space, because these peculiar clauses in orders and acceptances, though various in language, are often closely similar in significance, and make very close cases, and present great difficulty in determining, in any given case, whether the order is a bill of exchange and its acceptance absolute or conditional.

The learned counsel of the appellants have cited several cases which they most ingeniously claim to be applicable to this case, and to show by authority that this acceptance is payable out of a particular fund, and conditional, and therefore no bill of exchange.

In *Gerard v. La Coste*, 1 Dall. 194; 1 Am. Dec. 236, it is held that the order in that case, not having words of negotiability, was not assignable so as to allow the holder to sue upon it; but it is also held that it was a bill of exchange, and when accepted, bound all parties to it absolutely. In *Cook v. Saterlee*, 6 Cow. 108, the order was upon the drawee to pay and take up the note of the drawer in the possession of the payee; and it was held that it was not a bill of exchange, but a mere engagement, and in declaring upon it the payee must show performance. In *Atkinson v. Manks*, 1 Cow. 691, the order was drawn for the delivery of goods in the hands of the drawee, and of course was no bill of exchange.

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The order in *Jackman v. Bowker*, 4 Metc. 235, was upon the drawee to pay an uncertain amount; to be ascertained upon a final settlement with the payee, and out of an uncertain fund in the hands of the drawee, and therefore no bill of exchange.

The case of *Munger v. Shannon*, 61 N. Y. 251, claimed to be especially in point, is essentially different from this case. The fund was in the hands and under the joint control of the drawer and drawee as copartners, and the order was drawn upon the drawer's share of the profits of the partnership business, which could not be ascertained without accounting and settlement.

But whether this order was strictly a bill of exchange or not, this defense is not available against an absolute and general acceptance.

In *Maber v. Massias*, 2 Wm. Bl. 1072, the order was for money, the product of the drawers' goods in the hands of the drawee, after discharging present acceptances, and the acceptance was general; and it was held that the acceptor could not defend on the ground of balances due him from the drawers, when his acceptance was general and unconditional; and the court said: "But having accepted it generally in the terms of the draft, that is, subject to prior acceptances, he shall not shelter himself by this concealed balance due to himself in the course of a running account." The same equitable principle is recognized and enforced in the case of *Weston v. Barker*, 12 Johns. 276; 7 Am. Dec. 319, where the defendant was assignee of certain funds in trust for the payment of specified indebtedness of the assignor, and to hold the balance subject to his order, which order was given to the plaintiff. It was held that the acceptor of such a trust, and by it the acceptor of the order, could not set off against such order demands against the assignor arising from other transactions in which the plaintiff had no concern. In *Kemble v. Lull*, 3 McLean, 272, where the order was for a certain sum of money, "if in funds," and there was a general acceptance, it was held that after such a general acceptance the acceptor could not allege a want of consideration, and that the acceptance was an undertaking to pay the amount of the order to the plaintiff. To the same effect is the case of *McMenomy v. Ferrers*, 3 Johns. 71.

The defense in effect is, that the appellants, when the order was given, had already anticipated and absorbed the entire share of the grain belonging to the drawers, by claims and demands against them, and that therefore there was no consideration to the order;

and it places the appellants, the drawees and acceptors of the bill, in the attitude of knowing, when they accepted it, that they had no fund out of which it could be paid. This attitude most clearly shows that they accepted the bill upon the personal credit of the drawers alone, and not upon the credit of any fund, and as an accommodation to the drawers.

“It was no defense or bar, that the bill was known to the holder to be an accommodation bill as between the other parties, if he took it for value before due.” Story’s Bills of Ex., § 191.

By a proper construction of these words in the bill, and by the authorities, we are clearly of the opinion that this order is a valid bill of exchange, and is not payable out of a particular fund or conditionally, but absolutely, and that the words are used merely in reference to the means by which the appellants, the acceptors, might reimburse themselves for its payment, and that the defenses set up were unavailable.

BY THE COURT. The judgment of the Circuit Court is affirmed, with costs.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
MISSOURI

TURK V. FUNK.

(88 Mo. 18.)

Deed — recording — purchase-money mortgage — priority.

A purchaser of land on the same day gave a purchase-money mortgage to the vendor, and a mortgage to another, before the delivery of the deed, for money to make a cash payment on the purchase. Both mortgages were recorded on the same day, the latter first. *Held*, that the former had priority.

SUIT to foreclosure a real mortgage. The opinion states the facts.

Henry Flanagan and Henry Brumback, for appellant.

Harding & Buler, for respondents.

NAPTON, J. The only question in this case is that of priority between two mortgages recorded on the same day, one executed by the vendee of a tract of land to the vendor to secure the payment of part of the purchase-money, and the other made by the vendee to the person from whom he borrowed that part of the purchase-money required to be paid on the consummation of the trade.

The undisputed facts in this case are very simple. Turk, the plaintiff, agreed to sell Funk, one of the defendants, two pieces of land, one of 100 acres for \$1,200, and the other of 20 acres for

\$1,000. \$500 were to be paid by Funk on the first tract, and two notes given for \$350 each, payable in one and two years. On the other no money was to be paid down, but two notes were to be given for \$500 each, payable in one and two years. The deeds were not to be delivered to Funk until the payment of the \$500 and the execution of two mortgages to Turk, including each tract, to secure the payment of the \$1,700 due on the contract. The negotiation was conducted by Starr, an agent of Turk, with Funk, some weeks before it was concluded by an interchange of deeds, and according to the testimony of Funk, the particulars of the trade were communicated by Funk, the vendee, to Meyers, the defendant, from whom Funk expected to get the \$500 in order to secure the land. This statement of Funk is, however, contradicted by Meyers, and we will assume it to be false, although its probability is quite obvious. It is certain that on the 2d day of July, Funk and Starr went to the banking house of Meyers to complete the trade; that the \$500 was borrowed of Meyers by Funk, and handed over to Starr along with the two mortgages to secure the purchase-money unpaid, and at the same time Starr handed over the deeds of Turk. Which was done first, the two witnesses, who state the occurrence, do not profess to recollect exactly, but it was all done, as they say, about the same time. Both the witnesses agree, however, that when this was done, both Starr and Funk went directly to the recorder's office and filed their deeds about 11 o'clock A.M. of that day. Meyers' mortgage for the \$500 he lent to Funk was then on record. The following is a copy of Meyers' testimony on this point, taken from the record, and is all that is preserved in the record: "I did not agree with Turk to take a second mortgage; I knew nothing about a mortgage to Turk or unpaid purchase-money of the land. I paid out the money, got my mortgage and immediately had it recorded; saw the deed delivered after I got my mortgage."

The law applicable to the facts of this case, so far as they can be gathered from the record, seems very plain. According to the statement of Meyers himself, his mortgage was procured from Funk before the title from Turk to him had passed. Indeed, unless both Funk and Starr testified falsely, the mortgage to Meyers must have been made and delivered first, as they both state that as soon as the \$500 was paid and the deeds exchanged, they both went straight to the recorder's office, and there is no dispute that Meyers'

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mortgage was then recorded. It is unnecessary to add that upon these facts Meyers' mortgage could convey only Funk's then interest, which was a right to a deed when the purchase-money was secured. In other words, it was subject to the mortgage of Turk.

We have been unable to find any evidence whatever of any fraud practiced by Starr, the vendor's agent, by which Meyers could be misled. Meyers merely states, in general terms, that he knew of no unpaid purchase-money or mortgages to Turk. He does not say that Starr informed him that there were none, or that Starr did any thing or said any thing calculated to lead him to such a conclusion. He does not say that he inquired of any one, Starr or any one else, on the subject, much less does he say that Starr misled him. He evidently never saw the deed from Turk to Funk (indeed it is not in the record) until after Funk's mortgage to him was executed and recorded, for it was never delivered to Funk until after Meyers got his mortgage, nor does he in his evidence so state or even insinuate. He merely makes a general denial of knowledge concerning unpaid purchase-money and mortgages. It was his business to have informed himself about this—it was certainly not Turk's duty to tell him. Turk, or his agent, Starr, had a right to suppose that Meyers was competent to attend to his own interest and lend his money on such terms as suited him.

The judgment of the common pleas court is reversed and the cause remanded, with directions that the common pleas court enter a decree in conformity to this opinion, giving the vendor's mortgage priority. The other judges concur, except Judge NORTON.

Reversed.

BARNETT V. ATLANTIC AND PACIFIC RAILROAD CO.

(68 Mo. 56.)

Constitutional law—double damages for killing stock.

A statute allowing double damages to the owner of stock killed on a railroad through the neglect of the company to maintain the required fences, is penal in its nature, and constitutional.

ACTION for double damages for killing of stock. The opinion states the case. The plaintiff had judgment below.

Barnett v. Atlantic and Pacific Railroad Co.

C. M. Napton, for appellant.

Heard & Jackson, for respondent.

HOUGH, J. This was an action under the 43d section of the railroad act for double damages for stock killed in consequence of the failure of the railroad company to erect and maintain fences as provided by law. The plaintiff had judgment and the defendant has appealed.

The defendant contends that so much of the 43d section as entitles the plaintiff to double damages is unconstitutional, whether the statute be considered as compensatory or penal in its nature. If it be regarded as compensatory only, it is argued that it is unconstitutional, in that it gives the party injured twice the amount of all damages sustained by him, and thus transfers the property of one man to another as a gratuity; and not in the redress of any injury. If it be penal, it is claimed that it is unconstitutional, in that the penalty is given to the person injured, and not to the school fund.

It is manifest that if this statute can be maintained at all, it must be maintained upon the ground that it is a penal statute. Parties civilly injured are by way of recompense entitled only to full and adequate compensation for all the damages sustained by them, and an act of the legislature which should provide that in all civil actions the plaintiff should recover twice the amount of the damages actually sustained by him, would undoubtedly be declared to be unconstitutional and void.

The statute under consideration is unquestionably a penal statute. It was so regarded by this court in the case of *Gorman v. Pacific R. R.*, 26 Mo. 450, when single damages only were recoverable under its provisions. In *Trice v. Hann. & St. Jo. R. R.*, 49 Mo. 440, it was said "while the protection of property of adjacent proprietors is an incidental object to the statute, its main and leading one is the protection of the travelling public. To insure such protection railroads are imperatively required to fence their tracks, and the penal liability deemed necessary to enforce this requirement is a matter of legislative discretion." A critical examination of the case of *Hudson v. St. Louis, Kansas City & Northern Ry.*, 53 Mo. 536, will show that the sum to be recovered under this section was there regarded as a penalty. The same may be said of the cases of

Barnett v. Atlantic and Pacific Railroad Co.

Seaton v. Chicago, Rock Island & Pacific R. R. Co., 55 Mo. 416, and *Parish v. Missouri, Kansas & Texas Ry.*, 63 id. 286. In the last two cases it is true it was said that the statute was both penal and compensatory ; but it is evident that the word compensatory was only used to convey the idea that the party aggrieved was the person authorized to sue for and recover the penalty, and thus receive compensation for his loss. The act in question was chiefly intended for the protection of persons who are transported in railway carriages, and similar enactments have repeatedly been held to be a proper exercise of the police power of the State. Cooley's Con. Lim. 578, and authorities cited. Being a penal statute, in the absence of any constitutional restriction, the legislature may lawfully make such disposition of the penalty imposed by it, as will, in its discretion, best subserve the purpose of the enactment. Instead of giving the whole of the penalty to the State, or the county, or of dividing the penalty and providing for a *qui tam* action, the whole of the penalty is given to the party aggrieved, and the method adopted is doubtless a most efficient one for enforcing the statute.

It is said, however, that the 5th section of article 9, of the Constitution of 1865, and the 8th section of the 11th article of the Constitution of 1875, prohibit the appropriation of this penalty to private uses, by requiring that all penalties shall go to the school fund.

[Omitting the discussion of this point.]

The case of *Atchison & Nebraska R. R. v. Baty*, 6 Neb. 37 ; s. c., 29 Am. Rep. 356, we do not conceive to be in point. The statute passed upon in that case is not like ours, but gave the owner of live stock killed on the railroad track double its value, unless the value was paid within thirty days after demand made on the company therefor. There the double damages were given, not for the violation of any criminal or penal statute passed by the legislature in the exercise of its police power, but as a penalty imposed upon the defendant in its character as a private person for delay in making payment after demand made, and the law was, therefore, declared to be partial and void. It was also said to be in conflict with a constitutional provision in relation to fines and penalties.

The judgment in this case must be reversed, however, for another reason.

[Omitting this, a technical point.]

Judgment reversed.

Matthews v. City of Alexandria.

MATTHEWS V. CITY OF ALEXANDRIA.

(68 Mo. 115.)

Municipal corporation — cannot delegate its legislative powers.

A city authorized by its charter to erect, repair and regulate public wharves, and to fix the rate of wharfage thereat, cannot lease its wharf, or farm out its revenues, or empower any one else to fix the rates of wharfage.*

ACTION upon city bonds. The opinion states the case. The plaintiff had judgment.

J. G. Blair, for plaintiff in error.

James Hagerman, for defendant in error.

HOUGH, J. This was a suit upon one hundred and ten bonds of the city of Alexandria, twenty of which are dated October 8th, 1859; thirty are dated December 3d, 1859, and sixty are dated July 7th, 1860, each for \$100, payable ten years after date, with ten per cent interest, to A. Maxwell, or his assigns. The petition alleges the written assignment thereof by Maxwell to William Matthews, the plaintiff, on the 26th day of August, 1872. The bonds are not payable out of any particular fund, but are the absolute obligations of the city to pay the sums specified. The city in its answer admitted the validity, due execution and delivery of the bonds, and stated that they were executed by the city for a debt due Maxwell for the construction of the public wharf of the city. The answer further averred that the city, under its charter, had the power to erect, repair and regulate public wharves and docks, and fix the rates of wharfage thereat, and issue the bonds of the city thereon, and to appropriate and apply the wharfage and dockage arising therefrom in payment of such bonds. The answer, also, sets out a certain contract made on the 5th day of November, 1867, between said Maxwell and the city, in words and figures, as follows:

“This agreement, made and entered into by and between the city of Alexandria, Clark county, Missouri, of the first part, and

*See to same effect, *Birdsall v. Clark* (73 N. Y. 73), 29 Am. Rep. 105, and note, 105.

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Andrew Maxwell, of the second part, witnesseth, that whereas, the said city of Alexandria is indebted to the said Andrew Maxwell in the sum of \$11,000, besides accrued interest, being an indebtedness created by the construction of the wharf or levee, along the Mississippi river, in front of said city, and which indebtedness is evidenced by certain bonds, each for the sum of \$100, issued by the mayor and register of said city, all dated July 7th, 1860, December 3d, 1859, and October 8th, 1859, payable unto the said A. Maxwell, or assigns, and each due ten years after date, as by the interest coupons thereunto attached; Now, for value received, and for the purpose of paying and discharging said indebtedness, it is hereby agreed by and between said parties, as follows: The said city hereby leases to said Maxwell the said wharf in front of said city, for a period of twenty years from this date, and the said city also authorizes the said Maxwell to collect for his own use and benefit from all vessels and persons, except the ferry, all charges by way of wharfage or otherwise accruing during the said period of twenty years, and also all wharfage due and unpaid up to date of this contract; and the said city of Alexandria also agrees to protect and defend the said Maxwell in the use and enjoyment of the rents and profits and income of said wharf, or levee, by way of wharfage or otherwise, except the ferry, during the whole of said period; and also to pay any cost and expense which he, the said Maxwell, may be put to in the way of defending or protecting his right thereto by way of litigation or otherwise; and the said city will not hold itself responsible for any costs that may accrue in the collection of debts by the said A. Maxwell that were made previous to the date of this contract, or any costs or expenses that may be made by reason of negligence, on his part, during the term of this agreement; and the said city guarantees to the said Maxwell the right to collect reasonable wharfage from all boats, crafts, vessels, etc., except the Warsaw and Alexandria ferry, landing at the said city of Alexandria, whether they shall land in front of said paved and completed levee or elsewhere.

In consideration whereof, the said Andrew Maxwell agrees that the receipts by him of said wharfage, and of the rights and privileges hereinbefore guaranteed to him by the said city shall be in full and complete payment and discharge of the bonds and coupons hereinbefore described as held by him against said city; and the said Maxwell also agrees to keep the paved portion of said levee

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(that is, the levee from a point opposite the mouth of Pearl street to the alley running between block ten (10) and eleven (11) on the Des Moines river), in good condition, ordinary wear and tear and unavoidable accidents excepted, and to return said wharf to said city at the expiration of said term of twenty years. The said Maxwell also agrees that he will not charge for wharfage, during the time he shall hold said levee, a price or prices higher than the average price or prices charged at the cities of Canton and LaGrange, Missouri, and Warsaw, Illinois. It is also further mutually agreed that the aforesaid bonds and coupons shall be deposited with James FitzHenry for safe-keeping, and to hold them in trust for the parties hereto; and that at the expiration of said term of twenty years, in the event that said city fulfills its part of this agreement, the said James FitzHenry shall deliver said bonds and coupons to the said city to be cancelled, as having been paid in full; but in case, for any cause, the said city shall fail to carry out this contract, and the said Maxwell shall, at any time, be deprived of said wharfage, or held not to be entitled thereto under this agreement, then this agreement shall become void, except that any money actually received by said Maxwell under it shall apply toward the cancellation of said bonds and coupons, and in that case the said James FitzHenry shall return the uncanceled bonds and coupons to the said Maxwell or assigns, whose claims and rights thereunder shall remain unimpaired. The said city requires that the said Maxwell, or assigns, shall keep an account on a book for that purpose, of the receipts of all wharfage collected by him. In witness whereof, the said parties (the said city, by its mayor, acting under the authority of an ordinance of the board of aldermen) have hereunto signed their names this 5th day of November, 1867.

“WM. SHERVIN,

“Mayor of the City of Alexandria.

“A. MAXWELL”

The answer pleads the foregoing contract, in bar of this suit, and sets up counter-claim for not using due diligence in collecting wharfage, counter-claim for not keeping proper books, counter-claim for not keeping wharf in proper repair, and counter-claim for wharfage actually collected. On motion of plaintiff, the court struck out all that part of the answer referring to said contract, except the portion setting up a claim for money actually collected

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thereunder, on the ground that the city had no power to make the same.

The replication to the answer admits that the bonds were given for a debt due Maxwell for constructing the public wharf of the city, but denies that the city had the power to appropriate the wharf revenues to the payment of the bonds, or to lease the wharf; and avers the pretended contract of lease to be void for want of power in the city to make it. Upon the trial the court rendered judgment for the amount of the bonds with interest, less the amount of wharfage actually collected by Maxwell and Matthews, treating that as money received by them for the use and benefit of the city, and the defendant has appealed to this court.

The principal question presented for our determination is whether the contract of November 5th, 1867, between Maxwell and the city is valid. It is well settled by judicial decisions in this State and elsewhere, that the legislative powers of a municipal corporation cannot be delegated to others. Such powers are in the nature of public trusts conferred upon the legislative assembly of the corporation for the public benefit, and cannot be vicariously exercised. *Cooley's Const. Lim.* 204, 205; *City of St. Louis v. Clemens*, 43 Mo. 403; *City v. Clemens*, 52 id. 138. By the charter of the city of Alexandria, authority was conferred upon the city council to erect, repair and regulate public wharves and docks, and to fix the rate of wharfage thereat. Acts 1849, 352; Acts 1851, 393. No authority was given by the charter to the city to lease the wharf, or farm out its revenues, or to empower any one else to fix the rates of wharfage. All these things were attempted to be done by the contract under consideration, and being wholly unauthorized, the contract was illegal and void. The legislative authority of the city could not be delegated, nor could the city abdicate its control over the public property held in trust by it for the benefit of the public. 2 Dill. on Mun. Corp., §§ 445, 512; *Illinois Canal Co. v. St. Louis*, 2 Dill. 84, 92; *Oakland v. Carpentier*, 13 Cal. 540; *Gale v. Kalamazoo*, 23 Mich. 344; s. c., 9 Am. Rep. 80.

We see no merit in the objection made to the right of Matthews to the possession of the bonds as the assignee of Maxwell, nor do we perceive any error in the action of the court on the pleadings. The judgment of the Circuit Court will be affirmed.

The other judges concur.

Affirmed.

STATE V. EADES.

(68 Mo. 150.)

Criminal law — forgery — municipal certificate of indebtedness ultra vires.

Under a statute constituting it forgery fraudulently and falsely to make any instrument purporting to be the act of another, by which any pecuniary demand shall purport to be created, etc., the fraudulently making of a false municipal certificate of indebtedness is forgery, although the municipality has no power to issue such certificates. (*See note, p. 782.*)

INDICTMENT for forgery. The opinion states the facts. The indictment was quashed below.

J. L. Smith, attorney-general, for the State.

Tichenor & Warner, for respondent.

NORTON, J. Defendant was indicted in the Criminal Court of Jackson county at its November term, 1874, for forgery. The indictment contains five counts, in some of which defendant is charged with forgery, and in others with uttering the following certificate of indebtedness of the city of Kansas :

Certificate of Indebtedness of the City of Kansas.

STATE OF MISSOURI, {		
County of Jackson, { ss.:	\$150.	No. 1792

This is to certify that the city of Kansas is indebted to John Halpin in the sum of one hundred and fifty dollars, due and payable October 1st, 1873, with interest at the rate of ten per cent per annum from July 10th, 1872. Said indebtedness having accrued on account of the Bluff street bridge.

By order of the common council.

Approved July 8th, 1872.

HENRY C. KUMPF,
Auditor.

R. H. HUNT,
Mayor.

Defendant filed his motion to quash the indictment, which was sustained, and the State brings the case here by appeal. The reasons alleged in the motion to quash are that the crime of forgery is not

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charged, that the instrument of writing set out is not such as the crime of forgery can be committed of, and that there is no allegation that it is of any value. No brief having been filed by the respondent, we are left to ascertain the specific grounds relied upon to support the objections made.

The indictment is framed on Wag. Stat., § 16, p. 470, which is as follows: "Every person who, with intent to injure or defraud, shall falsely make, alter, forge or counterfeit any instrument or writing, being or purporting to be the act of another, by which any pecuniary demand or obligation shall be, or purport to be transferred, created, increased, discharged or diminished, or by which any rights or property whatever shall be, or purport to be transferred, conveyed, discharged, increased, or in any manner affected, * * shall, on conviction, be adjudged guilty of forgery in the third degree."

The indictment formally charges the offense as defined by this section, and is in conformity with approved precedents. Whart. on Prec. 264. It is, however, claimed that the instrument set out therein is not such as can be the subject of forgery, because the charter of the city of Kansas does not confer on the mayor and common council the power to issue the same. Section 16, *supra*, is broad and sweeping in its definition of this grade of forgery, and would seem to embrace, as the subject of it, every false writing made with intent to defraud or injure, which, on its face, would be likely to defraud.

Upon a statute of New York, similar to our own, which came before the court for construction in the case of *The People v. Krummer*, 4 Park. 217, it was held that "we are never called upon to determine whether in legal construction the false instrument or writing is an instrument of a particular name or character. It is a matter of perfect indifference whether it possesses or not the legal requisites of a bill of exchange, or an order for the payment of money or the delivery of property. The question is whether on its face it will have the effect to defraud those who may act on it as genuine, or the person whose name is forged. It is not essential that the person, in whose name it purports to be made, should have the legal capacity to make it, nor that the person to whom it is directed be bound to act upon it, as genuine, or have a remedy over. Though all the parties to a bill of exchange are purely fictitious, if it be passed as genuine, it is regarded by the law as forgery. The

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law looks only to the falsity of the instrument and the fraudulent use of it as genuine."

Authorities are to be found in support of the proposition maintained by defendant, among which may be cited *Clinch's case*, 2 East's Pleas, 938, and *People v. Wright*, 9 Wend. 193. It was, however, observed in the former case that "if the writing purport to be an order which the party has a right to make, although in truth he had no such right, and although no such person existed in fact as the order purports to be made by, it falls within the penalty of the act;" and the latter case, *People v. Wright*, has been criticised, if not overruled, in the case of *People v. Stearns*, 21 Wend. 409.

While conceding that there is a conflict of authority on the question presented, we are disposed to follow the principle announced in the case of *People v. Krummer, supra*, as reflecting the spirit and meaning of the statute as to the class of writings which under it are the subjects of forgery, and applying the test there laid down to the indictment in question, it is sufficient to require defendant to answer it. Judgment reversed and cause remanded, with the concurrence of the other judges.

Reversed and remanded.

NOTE BY THE REPORTER. — Compare *Rhode v. State*, 5 Neb. 174; s. c., 23 Am. Rep. 473. In *People v. Mann*, 73 N. Y. 484, it was held that a county treasurer, who without authority had executed in his own name as such treasurer an instrument purporting in the body to be the obligation of the county, is not guilty of forgery.

STATE V. SANDERS.

(68 Mo. 202.)

Criminal law—jury—experiments by, out of court, in regard to foot-marks.

In his argument to the jury on the trial of a felony, the defendant's counsel said in regard to a question of foot-prints that the jury might try for themselves whether such worn-out boots as the witnesses for the prosecution described would make such tracks as they described. Some of the jury, without leave, made the experiment out of court. *Held*, such error as invalidated a conviction.*

CONVICTION of assault with intent to kill. The opinion states the facts.

* See *Stokes v. State*, ante, p. 72.

State v. Sanders.

Bray & Cravens, Walser & Cunningham, for appellant.

J. L. Smith, attorney-general, for the State.

NAPTON, J. This was an indictment for an assault upon one George Burgoon, with intent to kill. The assault was committed on the night of the 26th of July, 1876, when Burgoon, who lived about three miles from Carthage, in Jasper county, was in his bed asleep, between ten and eleven o'clock at night. That the assault was cowardly and with murderous intent is not questioned, the only question being whether the defendant was the man who committed it. As the night was dark, the evidence was necessarily mainly circumstantial, and strongly pointed to the defendant; there was also a mass of testimony, equally strong, conflicting therewith, not indicating or implicating any other person, altogether making a case peculiarly proper for a jury. The only matters for our consideration are the propriety of the instructions and the admissibility of the evidence on which they were based, and the refusal of the court to set aside the verdict on account of alleged misbehavior of the jury.

[Omitting minor questions.]

The principal objection to the judgment in this case is based on an affidavit in regard to the misconduct of the jury. This affidavit was made by one Snyder, who was not a jurymen. He states that on the morning after the jury retired he saw several persons, whom he afterward ascertained to be jurors, experimenting with an old shoe, which had a hole freshly cut through the sole, to see whether a track made by it would be similar to the track testified to as being in the lane running west from Burgoon's house; that one of the jurors stepped up to him and said: "We have been trying tracks, look here," pointing to tracks made in the dust with the old shoe, "we have been making tracks with an old shoe," pointing to a shoe then in the possession of the juror; that the affiant remarked to the juror (not at that time knowing he was a juror) that the shoe shown him was not like the sole of the boot referred to in the evidence, to which the juror replied: "It would make a track any how;" referring, as the affiant supposed, to the boot spoken of by the witnesses on the trial. An affidavit of the jurymen, Leathers, who was referred to in the above affidavit by the bystander, was then read, which is as follows: "He was one of the jurymen in the trial of Sanders; that L. P. Cunningham, in his

argument after the close of the evidence, told the jury to just try worn-out boots and see for themselves whether they would make imprints in dust or sand, as claimed by the prosecution; that boots worn-out like boots referred to in evidence would do, and told the jury they had a right to make the experiment for themselves, to satisfy their own minds on the point. The affiant then made the experiment and was seen and reported by Mr. Snyder."

An affidavit from another jurymen named Jessup is found in the record, which states "that during the trial of the above cause, W. F. Leathers, one of the jurors, told him he had taken an old shoe and cut a hole in the outer sole and tried it in the dust, and they might talk to him as much as they pleased about a boot worn as the one testified to by the witnesses not showing the size and shape of the place worn out, but he knew better; that he had tested that himself as aforesaid, and he knew it would show the marks of the place worn out." What was done with this affidavit is not stated. It is well settled that jurors are not allowed to impeach their own verdict. *State v. Coupenhaven*, 39 Mo. 430, and cases there cited; *State v. Alexander*, 66 id. 148.

Disregarding the affidavit of the juror Jessup which was clearly inadmissible, we have still before us the fact that a portion of the jury experimented, with a view to ascertain a fact testified to on the trial, and to test the credibility of the witnesses who testified in regard to that fact. That such experiments by a portion of the jury, or by all the jury, are improper, without leave of the court, is incontrovertible. In some States the jury are allowed by the court, even on criminal charges, but under charge of the sheriff, to view the ground where the offense is charged to have been committed, for the purpose of determining for themselves, as to the credibility of witnesses who were examined in the case. *State v. Knapp*, 45 N. H. 148. It is not necessary to determine in this case whether our courts have any such power. There has been, undoubtedly, some relaxation of the rules prevailing anciently in regard to juries, but I have not found any case where the jury, after the cause was submitted to them, was allowed to receive evidence which could have any bearing on the case. The question here, however, is whether, after the jury are invited by the defendant's counsel to make certain experiments for themselves, and the jury, or a portion of them do so, the defendant can, after the verdict is unfavorable, take advantage of this misconduct of the jury,

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invited by himself. This looks like allowing a party to take advantage of his own wrong, and therefore has caused some hesitation on our part, but upon reflection we have concluded that the court and the attorney for the State must share the responsibility of such misstatements by allowing them to go uncontradicted. The judge, who presides at a trial of a criminal, should not allow the jury to be misled as to their duties or powers.

Indeed, regarding the affidavit of juror Leathers as a correct representation of the speech of Mr. Cunningham, it will be seen that the invitation was to the jury as a body, and not to any individual member or members of it, and it seems clear from the testimony of the by-stander, that only a portion of the jury participated in this experiment in the street upon the old shoe. It may be presumed that the result was communicated to the other jurors, thus introducing evidence on a very material point in the case, in the absence of the defendant and the court. If we consider the affidavit of Jessup, no presumption is necessary, but apart from that, the possibility of the experiment being so used is sufficient to establish its impropriety. Upon the whole, without especial regard to the present case, we are of opinion that it would be unsafe to further relax the well-established rules governing the conduct of juries, and that we must, therefore, remand this case for another trial. Judgment reversed and case remanded. The other judges concur.

Judgment reversed.

STATE V. DOECKE.

(68 Mo. 208.)

Criminal law — larceny — coffin — who has property in — criterion of value.

In an indictment for larceny of a coffin containing the remains of a human being, the coffin is properly charged to be the property of the person who furnished it and buried the deceased.

In distinguishing between grand and petit larceny, the criterion of value is the price which the subject of the larceny would bring in open market.

CONVICTION of grand larceny. The opinion states the facts.

C. C. Simmons and J. J. McBride, for appellant.

J. L. Smith, attorney-general, for the State.

HENRY, J: It is conceded by counsel for appellant, and fully established by the authorities, that a coffin in which the remains of a human being were interred, was a subject of larceny at common law.

[Omitting statutory considerations.]

The coffin was alleged in the indictment to be the property of one Merkel, a son-in-law of the deceased, and it is contended that when he had the body interred he parted with all the property he had in the coffin, and that, therefore, the conviction of defendant cannot be sustained. Roscoe, in his work on Criminal Evidence, says: "A shroud stolen from the corpse must be laid to be the property of the executor, or of whoever else buried the deceased;" p. 604, 6th Am. ed.; 1 Chitty's Crim. Law (5th Am. ed.) 44; 1 Hawk. P. C. 144, 148; 4 Shars. Blackst. 235. All these authorities, it is true, speak only of shrouds and ornaments buried with the dead, but the principle upon which these may be alleged to be the property of the executor or of the person who buried the deceased, will certainly sustain an allegation that the coffin is the property of the person who buried the deceased.

The court, for the State, instructed the jury that if they found that the coffin was of less value than \$10, and that defendant stole it, they should convict him of petit larceny. By another instruction they were told that in order to convict defendant of grand larceny they should find the coffin to have been of the value of \$10 or more, and that it was sufficient if they found it to have been of that value to the owner, and that it was not required that it should be of that value to third persons, or that it would command that price in the open market. This latter instruction was erroneous. The authorities cited to support the doctrine it announced give it no countenance. In 3 Greenleaf's Evidence, p. 140, § 153, the author says: "Nor is it necessary to prove the value of the goods stolen, except in prosecuting under statutes which have made the value material either in constituting the offense or in awarding the punishment. But the goods must be shown to be of some value at least to the owner, such as reissuable bankers' notes, or other notes completely executed but not delivered or put into circulation, though to third persons they might be worthless." It is clear that in the latter clause he was speaking of other prosecutions than those under statutes which make the value material, either in constituting the offense or awarding the punishment.

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“By the English law, as it stood when this country was settled, larceny was divided into grand and petit; the former being committed where the goods stolen were over twelve pence in value, the latter where they were of the value of twelve pence or under.” Bishop’s Crim. Law, vol. 1, § 679. “In these valuations (says East) the valuation ought to be reasonable; for when the statute (of West. I, ch. 15) was made, silver was but 20d an ounce, and at the time Lord COKE wrote, it was worth 5s, and it is now higher.” 2 East’s P. C. 736. So Lord COKE, 2 Inst. 189, says: “The things stolen are to be reasonably valued, for the ounce of silver at the making of this act was at the value of 20d, and now it is at the value of 5s and above.” See, also, 4 Blackst. Com. 237. The statute of Westminster I, ch. 15, referred to by these authors, was that by which the distinction betwixt grand and petit larceny was made.

By Stats. 7 and 8 Geo. IV, ch. 29, § 2, that distinction was abolished, and every larceny, without regard to the value of the goods, was made grand larceny. 4 Shars. Blackst. 230. When it is said by elementary writers, and in adjudged cases, that in order to constitute the offense of larceny, it is sufficient if the thing stolen be of some value to the owner, however small, although to third persons worthless, the observations relate to the offense of petit larceny, or to simple larceny under the statute 7 and 8 Geo. IV, and similar statutes, and are wholly inapplicable to grand larceny. Where a distinction is made by statute between that and petit larceny, based upon the value of the goods stolen, the remarks of East and Lord COKE above quoted show conclusively that the value of the goods was to be measured by the current coin of the realm, and that the cash value was that to be ascertained in determining whether the theft was grand or petit larceny.

If the criterion of the value given by the court in the second of the above instructions be correct, one might be convicted of grand larceny for stealing a finger ring of the intrinsic or market value of \$5, only because, forsooth, being a gift to the owner by a departed friend, or wife or other loved one, he placed an estimate upon it far beyond its value, although of no greater value to third persons than another ring of the same kind, which could be purchased wherever kept for sale for \$5. The criterion of value by which the jury were told in that instruction they might be governed does not apply as a general rule in civil proceedings, and when the statute

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requires that property stolen shall be of the value of \$10 in order to constitute the theft thereof grand larceny, the term "value" is to be taken in its legal sense, which does not differ from its common acceptation, and there is no warrant for allowing any other mode of ascertaining the value of stolen property in a criminal prosecution than that which prevails generally in criminal proceedings. It is not the fancy estimate of value placed upon the property by the owner which is to determine whether the theft is grand or petit larceny, but its actual value, as that value is usually ascertained in other proceedings.

If one sue another for conversion of personal property, he recovers not what the property was worth to him, but its value in the market; and it would be strange enough if, when the statute declares that no one shall be adjudged guilty of grand larceny unless the goods stolen were of the value of \$10, a criterion of value should be adopted which would authorize a conviction for that offense, when the goods stolen are worthless to third persons and of no market value, but possess a value which can only be measured by fancy or sentiment, a measure of value as uncertain and variable as the whims and caprices of the owner of the goods, or the witnesses he may introduce to prove their value. We cannot substitute this for the stable and certain measure furnished by the price which such goods command in the market. In some civil cases, we are aware, the jury are allowed to consider *pretium affectionis* in estimating the value of property, but the reason for the departure from the general rule in those cases does not apply in a prosecution for stealing such property. The purpose of the prosecution is to punish the thief, not to compensate the owner of the property for his loss. The judgment of the Court of Appeals is reversed and cause remanded.

All concur.

Reversed and remanded.

STATE TO USE OF CARROLL COUNTY V. ROBERTS.

(68 Mo. 234.)

Surety — on collector's bond — extension of principal's time to pay.

A statutory extension of the time of a collector of taxes to pay over his collections operates to discharge the sureties on his bond previously given.

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ACTION on tax collector's bond. The opinion states the facts. The plaintiff had judgment below.

Hale & Eads, for plaintiffs in error.

HENRY, J. Roberts was elected sheriff of Carroll county at the general election held in November, 1868, for the term of two years. By his election and qualification as sheriff, he became *ex officio* collector of the State and county revenue, and as such executed the bond which is the foundation of this action against him and his securities thereon.

The law in force at the date of the bond, relative to the question involved in the controversy, is to be found in the general statutes of 1865, § 10, p. 113 ; §§ 44, 52, pp. 117, 118, and the session acts of 1870, §§ 3, 6, p. 121. The condition of the bond executed by defendants is in conformity to the requirement of section 10, page 113, and is that the collector "will faithfully and punctually collect and pay over all the State and county revenue for the year next ensuing his appointment, and that he will, in all things, faithfully perform all the duties of his office as collector according to law." Section 44, page 117, provided that "at the term of the county court, to be held on the 3d Monday in December (except in St. Louis county, etc.) the collector shall return the delinquent list under oath or affirmation, to such court, and settle his account of all moneys received by him on account of taxes and other sources of revenue, and the amounts of such delinquent list, or so much thereof as the court shall find properly returned delinquent, shall be allowed and credited to the collector on his settlement." Section 52, "every collector, except the collector of St. Louis county, shall annually, within thirty days after his settlement on the third Monday in December, with the county court, settle his account with the State auditor and pay into the State treasury the whole amount of the revenue and other funds with which he may stand charged, after deducting his commissions and mileage, and the treasurer shall give duplicate receipts for the amount paid, one of which shall be deposited with the auditor."

By the act of 1870, section 44 was so amended by section 3 as to require the settlement by the collector to be made with the county court on the third Monday in January instead of the third Monday in December, and section 52 was so amended by section 6 as to require

the payment into the State treasury by the collector within thirty days after the settlement contemplated by section 3 of the balance of all revenues then due to the State, etc.

It is contended by the securities, that this extension of time for the settlement by the collector discharged them from liability on the bond. As between individuals, if the creditor for a valuable consideration agree with the principal debtor to extend the time of payment or the demand without the consent of the sureties, they are discharged from liability. Is the same principle applicable to the State as a creditor? It may be urged that the State, receiving no consideration for the indulgence, does not by an act of the general assembly extending the time thereby release the securities. It may be answered that the only reason why, as between individuals, there must be a valid agreement to extend the time in order to release sureties who have not consented to the extension is, that otherwise it is not obligatory upon the creditor, and his right to demand and sue for the debt is not suspended, there being no way except by a valid contract to make a promised extension binding upon the creditor. But the acts of the general assembly are binding upon every citizen and every officer of the State, and by a legislative enactment the extension is as effectual as an extension secured by a valid contract between an individual creditor and his debtor. The fact that acts of the general assembly of this character are repealable at the pleasure of that body cannot affect the question, because the suspension of the right of the State to sue upon her demand has been accomplished from the date of the approval of the bill until its repeal, and if the right of the creditor to proceed against the principal is postponed but for a day, as between individuals, it as effectually discharges the sureties as if it had been suspended for a month or a year.

The State cannot, by a legislative act, materially modify a contract between herself and a citizen any more than she can impair the obligations of a contract between citizens. The legislature cannot increase or vary the obligations of a citizen in a contract entered into by him with the State, and the effect of such legislation as we are considering, if it does not release the security, is to extend his liability on the bond for a longer period of time than he agreed to be bound, and to increase the risk he has taken beyond that which he assumed when he executed the bond. By the law, when the obligation was entered into, the collector was required to settle

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with the county court on the third Monday in December. By the act of 1870, that settlement was postponed to the third Monday in January. No officer in the State, nor any judicial tribunal could, after the act of 1870, demand of the collector a settlement before the third Monday in January, or the payment of the balance of moneys then in his hands within thirty days after such settlement; and to hold the securities liable, under these circumstances, would be to declare that the State by an act of the legislature may extend the time for which the securities have agreed to be bound for the principal, and by thus modifying the contract hold them liable for risks which they did not agree to take. The State has no more right or authority to change a contract betwixt her and an individual than she has to compel the individual to make such a contract in the first instance.

A fundamental principle of constitutional law underlies the application of this doctrine to the State, as well as the familiar principle of the common law, upon which the securities rely. It is true, as is said in some of the cases, that the time fixed by law for the settlement by the collector at the date of the bond is no part of the contract. It is no part of the contract in the sense that if in consequence of the negligence of those officers who are required to settle with the collector, or for any other reason except an interposition by the State by legislative enactment preventing it, the settlement should not be made at the time required by the law in force at the date of the bond, such failure would operate to discharge the securities. Laches is not imputable to the State, and this is the doctrine announced by the Supreme Court of the United States in *U. S. v. Kirkpatrick*, 9 Wheat. 720; *U. S. v. Vanzandt*, 11 id. 184; *U. S. v. Nicholl*, 12 id. 509; *U. S. v. Boyd*, 15 Pet. 187, 208.

These cases are cited by the Virginia Court of Appeals in the *Commonwealth v. Holmes*, 25 Gratt. 771, in support of the doctrine that the securities are not released in a case like the one under consideration; but we submit that, except the case in 9th Wheaton, they only hold, as above indicated, that mere neglect to call the officer to a settlement at the time prescribed by law will not release the securities; that laches is not imputable to the government. In 9th Wheaton, *United States v. Kirkpatrick*, the Supreme Court of the United States, so far from holding the doctrine of the Virginia court, expressly decided "that the liability of the sureties was strictly confined to the duties and obligations created by the acts

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passed antecedent to the date of the bond." The court also remarked, the opinion being delivered by Judge STORY: "There is nothing in the original act under which the appointment was made which contemplates a permanent and continuing liability for all duties under all laws which might be subsequently passed."

The People v. Jansen, 7 Johns. 332; 5 Am. Dec. 275, was an action of debt on a bond executed by defendant's father in his life-time, on the 18th day of April, 1786, as one of the securities of Christian Tappen, one of the loan officers of Ulster county. The defense was that no deficiency on his part appeared to have been taken notice of by the supervisors until the year 1795, and no steps were taken by the supervisors to remove the loan officers, and they were not removed until January, 1804, though the evidence showed that the deficiency of the loan officer began in 1791, and continued for several successive years. In December, 1798, the supervisors ordered suits to be commenced on their bonds against the loan officers for their deficiencies, but they were not prosecuted, and the loan officers were indulged from time to time to make good their deficiencies, until the year 1803, when suits were again directed to be prosecuted against them. Henry Jansen, defendant's father, and one of Tappen's sureties, died in 1794. In the year 1798 Tappen was solvent and in good credit, and had the suit against him been prosecuted with usual diligence to judgment, the whole arrears might have been collected. The Supreme Court of New York held that the foregoing facts constituted a good defense to the action, and the court said: "This case differs essentially from the ordinary case of a security in a bond to a private individual. In such case the obligee is under no positive injunction or legal obligation to watch over the conduct of his principal debtor, and at stated periods to examine into his accounts, and in case of failure in punctual payment to adopt measures calculated to relieve the security. The risk of insolvency of the principal is assumed by the surety, and the liability of the latter continues, unless he should at least require of the creditor to enforce the payment. But the situation of the security in this case is widely different. The statute under which the bond was taken makes it the duty of the supervisors in each county, together with one or more of the judges of the Common Pleas, annually to meet and carefully to inspect and examine the minutes and accounts of the loan officers, and if it be found that any loan officer has refused or neglected to perform the duty

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enjoined upon him, they are directed to elect another in his stead. The security had a right to look to the provisions of this statute, and to calculate his liability on the presumption that the duties enjoined on these public officers would be faithfully and punctually discharged; and, if so, that he could in no event be responsible for more than one year's deficiency. There can be no doubt that the plaintiffs are chargeable with the consequences of the neglect or breach of duty of their agent or public officers intrusted with this business." This case, it will be perceived, carries the doctrine far beyond that held by the Supreme Court of the United States, and while we might not incline to give our assent to the doctrine of that case to its full extent, we cite it in support of the doctrine of the other cases cited, because of the respectability of the court by which the *People v. Jansen* was decided.

In *McCurdy v. Brown & Gibson*, 8 Mo. 550, which was an action against a constable and his securities for the failure of the constable to return an execution, the court held, SCOTT, J., that "when the security in this case executed the bond by which he is bound, the liability thus incurred was fixed and ascertained by law. Can the legislature then, by a subsequent act, say that this liability shall be increased? The existence of such a power in the general assembly cannot be maintained under our form of government." In the case of *Robert Pybus v. Henry Gibb*, 88 Eng. Com. Law Rep. 902, Lord CAMPBELL, C. J., said: "It may be considered settled law that where there is a bond of suretyship for an officer, and by the act of the parties, or by act of Parliament, the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond is avoided. Even if the sureties were consenting parties to such a change, it could hardly affect their liability under the bond." Again he said: "There being then such an increase of the jurisdiction of the court as to amount to a change in the nature of the court by giving bankruptcy jurisdiction and jurisdiction over absconding debtors, and the table of fees being altered, I think the office (bailiff of the court) is essentially changed and the sureties no longer liable. It was said that the breach here was one for which the sureties would have been liable if the office had remained unchanged. I think it would be most inconvenient if the sureties were liable for the breach of the original duties of the office and not for those superadded, so as to require discrimination as to duties all of which are performed

by the same officer in the same office. But we need not discuss that ; for we have the express authority of the House of Lords upon it in *Bonar v. MacDonald*, 3 H. L. Cas. 226. That was an appeal from Scotland, but on this subject the laws of the two countries are essentially the same. It was not the case of an office, but of an employment; fresh duties had, without the consent of the surety, been added to the employment, and then the principal made a default that was within the scope of his original employment; for that default the action was brought. It was argued then as here, that the liability should be the same as before; but the House of Lords, affirming the judgment below, held that after the addition of fresh duties the employment was essentially altered, and the sureties discharged. That is precisely in point. There is no inconvenience; for when an act of Parliament alters the duties of an officer, it will be easy to require him to give fresh sureties, or the surety bonds may be framed as suggested by MAULE, J., in *Mayor of Berwick v. Oswald*, 3 E. & B. 665; E. C. L. R., vol. 77, so as to continue the liability of the sureties, whatever alteration might take place by act of the legislature. As it is, I think the liability of the sureties on this bond at an end." The other judges, in separate opinions, concurred with the chief justice.

In the following cases it was directly held that the doctrine on this subject, which obtains betwixt individuals, is equally applicable to the State: *Prairie v. Jenkins*, 75 N. C. 546; *Davis v. The People*, 1 Gilm. 409. In this case it was expressly decided that where an act of the legislature gave a collector of taxes a longer time in which to make payment than he had by the law in existence when he executed his official bond with sureties, the sureties were fully discharged if the act was passed without consent. *The People v. McHatton et al.*, 2 Gilm. 639, is to the same effect. *Johnson v. Nacker*, 8 Heisk. 388, holds the same doctrine, and the opinion of the court delivered by NICHOLSON, C. J., is a very able discussion of the subject, and his argument is conclusive. The Virginia case is supported by the *State of Maryland v. Carleton*, 1 Gill, 249, but we have found no other, and these cases seem to stand by themselves. Section 97, p. 1179, Wag. Stat., is a recognition of the doctrine that any change or alteration in the law made by the general assembly after the execution of the bond would have discharged the sureties before the enactment of that section, which expressly provides that bonds given in pursuance of that act (Rev.

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enue Act) shall not be considered void, nor shall any security be released by any change or alteration in the law made by the general assembly, although made after the execution of the bond. Our conclusion in this case has not been reached but with great hesitancy, and on account of the public interests involved the question presented has received an unusual degree of attention ; but reason and the weight of authority demand that the judgment of the Circuit Court be reversed and the cause remanded.

All concur.

Judgment reversed.

BUTLER V. DORMAN.

(68 Mo. 298.)

Agency — agent selling by sample and on credit, receiving payment.

An agent selling goods only by sample, and forbidden to receive payment, sold goods on a credit of four months. Six days thereafter he drew in his own name for part of the price, which was paid. The money not being paid to his principal, *held*, that the payment did not protect the purchaser.

ACTION on account for goods sold. The opinion states the case. The defendant had judgment below.

R. C. McBeth, for plaintiff in error.

Chas. B. Wilson, for defendant in error.

HENRY, J. This was an action for the recovery of the balance of an account alleged to be due from Dorman to the plaintiffs. On the 12th day of September, 1874, the plaintiffs employed Wm. S. Ridgely as a travelling agent to sell goods for them by sample in the State of Missouri. On the 6th day of October thereafter, less than a month after his employment, he sold to defendant, on four months' time, two bills of goods, one for \$346.43, and the other for \$27.25. The agent was not intrusted with possession of the goods sold, and was expressly forbidden, by the terms of his employment, to receive payment for goods sold.

On the 12th day of October, 1874, six days after he sold the goods to the defendant, Ridgely drew a draft on the defendant for

\$60, and wrote requesting him as an especial favor to him to pay the draft, promising to return the money when he again reached Clinton, or to credit the amount on the bills of goods ; that he expected to return to Clinton, where defendant resided, in about ten days. Defendant paid plaintiffs all the bill except \$60, insisting that he was entitled to a credit for that amount paid to Ridgely.

A jury was waived and the cause was tried by the court. The principal question for determination is presented by the first declaration of law given by the court, which was : " That if the court find from the evidence that Wm. S. Ridgely was the agent of plaintiffs only to sell merchandise by sample for plaintiffs, and that in the month of October, 1874, defendant purchased of plaintiffs, through their agent Ridgely, the bill of goods in controversy, and that some few days after said purchase said agent drew on defendant for \$60, which defendant paid, then defendant is not entitled to a credit for said sum on said bill of goods against plaintiffs, unless said amount was by said agent paid over to plaintiffs, or unless said agent was authorized by plaintiffs to receive payment on such sales ; but such authority to receive payment need not be express, it may be implied from the fact of selling, unless the contrary appears." *Sumner v. Saunders*, 51 Mo. 89, *Brooks v. Jameson*, 55 id. 505, and *Rice v. Groffman*, 56 id. 434, are relied upon as sustaining the principle announced in that instruction.

In *Sumner v. Sands* the court construed the card recognizing Shriver as plaintiff's agent, as creating a general agency. Said ADAMS, J.: " By the card read in evidence, which is admitted to be genuine, Shriver was held out to the people of Shelby county as a general agent for plaintiff for that county." Shriver also had possession of the sewing machine when he sold it to the defendant. In *Brooks et al. v. Jameson* there is nothing analogous to this case. There the purchasers of the threshing machine from an agent were told, pending the negotiations for the sale, that they could pay the notes at Cameron, Missouri. Two of the notes were paid to the agents at Cameron. VORIES, J., who delivered the opinion of the court, observed that " the plaintiffs, when the second note became due, had written to defendants requesting them to pay it to these same agents. This they had been told by the agents when the notes were given was the way the payments were to be made. If the plaintiffs had by this course of dealing held out those men at Cameron as their agents to receive the money, and this induced

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the defendants to pay the money to the agents, they ought to be concluded thereby."

Rice et al. v. Groffman is no authority for the doctrine of the instruction in question. It is true it is there stated in general terms that "a power to sell goods includes a power to receive payment," but the ground upon which the decision is based appears in that paragraph of the opinion in which Judge NAPTON said: "Whatever the plaintiffs may say as to the agency of Berlzheimer, it is clear that he negotiated and effected the sale to defendant, that he had the cigars and delivered them, and there was nothing to show that he was not the owner except the bill; and conceding he was not, the presumption was, that as he had authority to sell, he had authority to receive payment."

The distinction between factors and brokers has long been settled. A factor is one to whom goods are consigned for sale. He has the possession and a special property, and on a sale may receive payment. A broker has not possession of the goods. Said PECKHAM, J., in *Higgins v. Moore*, 34 N. Y. 418: "It has been questioned among civilians, says Livermore, whether an authority to sell or let includes an authority to receive the price or not, and that Pothier says this power is not generally included. 1 Liv. on Agency, 74; Pothier's *Waite des obligations*, 477; but that in some cases it will be presumed, as if goods are put into the hands of public brokers to be sold, and they are in the habit of receiving the price. Putting the goods in their hands implies an authority to receive payment, as it does to receive payment on securities. 2 Liv. 284, 285; 3 Chitty's Crim. Law, 207, 208."

In *Rice v. Groffman* NAPTON, J., cites Story on Agency, § 102, for the general proposition that "a power to sell goods includes a power to receive payment on the sale," but Judge STORY qualifies that general proposition with a proviso that the payment is made at the time of the sale, and in a note it is stated that the purchaser cannot pay the agent at a subsequent time, unless there be some proof of authority other than a mere power to sell. *Seiple v. Irwin*, 30 Penn. St. 513; *Law v. Stokes*, 32 N. J. Law, 249.

In *Seiple v. Irwin* the court said: "It is undeniable that an agent to whom merchandise has been intrusted with authority to sell and deliver it is authorized to receive the price; otherwise the fraud on the purchaser would run into cruelty. This agent's powers were not embraced in that description. He was employed only to

make sales. As a check, his employers seem to have retained in their own hands the delivery of the goods and the appointment of the terms of sale. The goods in question were so delivered as to inform the defendant sufficiently of the character of the agency. When the agreement had been made for payment in six months, the contract was complete. The subsequent acceptance of cash, with a deduction of five per centum from the bill, was a new and totally unauthorized arrangement on the agent's part. In making payment, the defendant took the risk of his integrity, and they must bear the loss which his unfaithfulness imposed."

These remarks are strikingly applicable to the case we are considering. Here the goods had been sold on four months' credit, and six days after the sale was accomplished the agent drew the draft in question, which defendant paid. In *Law v. Stokes*, 32 N. J. Law, 250, the doctrine of *Seiple v. Irwin* was approved, and the court said: "An agent employed to make sales, and selling on credit, is not authorized subsequently to collect the price in the name of the principal, and payment to him will not discharge the purchaser unless he can show some authority in the agent other than that necessarily implied in a mere power to make sales." Again, "Where an agent is intrusted with the possession of goods with an unrestricted power to sell, or payments are made over the counter of the principal's store to a shopman accustomed to receive money there for his employer, the authority to receive payment will be implied in favor of innocent persons, because the principal, by his own act, gives to the agent an apparent authority to receive such payment."

From these and other authorities that might be cited, it seems clear that where the principal has clothed the agent with the *indicia* of authority to receive payment, as by intrusting to him the possession of the goods to be sold, the purchaser is warranted in paying the price to the agent, but where the agent has not the possession of the goods, or other *indicia* of authority, and is only authorized to sell, if the purchaser pays the price to the agent he does so at his peril, and it devolves upon him, in a suit for the purchase-money by the principal, to prove that the agent was also authorized to receive payment.

The declaration by the court that authority to receive payment by the agent might be implied from the authority to sell was incorrect. The judgment is reversed and the cause remanded.

All concur.

Reversed.

Lemon v. Chanslor.

LEMON V. CHANSLOR.

(88 Mo. 340.)

Carrier of passengers — negligence — hackney coachmen — liability to gratuitous passenger.

In the absence of express contract, a carrier of passengers by hackney coaches is liable for injuries resulting from his negligence to a gratuitous passenger.

ACTION of negligence. The opinion states the facts. The plaintiff had judgment below.

Wallace & Chiles, for appellants.

Phillips & Vest and *Rathbun & Shewalter*, for respondent.

NORTON, J. This suit was instituted in the Lafayette Circuit Court for the recovery of damages for injuries alleged to have been received by plaintiff, in consequence of the unsoundness of a hack used by defendants, as common carriers, in transporting persons from the depot of the Missouri Pacific railroad, in the city of Lexington to different points in said city. The petition alleges that plaintiff was received by defendants as a passenger, and that the hack used by them was unsound, unsafe and unfit for such use, in consequence of which, and the recklessness and gross negligence of defendants in using the same, it suddenly broke down, thereby greatly injuring plaintiff and disabling him permanently. The answer of defendants, after denying the allegations of the petition, sets up by way of defense that they were the owners of a livery-stable at Lexington, and kept horses and vehicles for hire, and that they were accustomed to send hacks to said depot for the purpose of conveying passengers therefrom to different points in the city, and avers that defendants were not common carriers of persons, but were livery men and hackney coachmen. The answer further avers that plaintiff was a conductor on the railroad from Sedalia to Lexington, which came to and departed from said depot the morning and evening of each day; and that plaintiff was accustomed, as a gratuitous passenger, to enter into the hacks of defendants and to be carried to and from said depot. That plaintiff, on

the day the injury was sustained, entered a hack of defendants without paying or expecting to pay fare; that said hack so entered was sound and roadworthy so far as could be seen or known by human foresight, skill and diligence. It is also alleged that said hack was drawn by well-trained and gentle horses, which were driven by an experienced and competent driver; that the hack was not overloaded, but from some cause unknown, and which the utmost skill and diligence could not foresee, the left spindle of the front axle gave way and occasioned the injury of which plaintiff complains.

After a motion to strike out all of said answer setting up new matter was overruled, plaintiff filed his replication traversing the same. Upon a trial of the cause, which was had in the Circuit Court of Saline county, the venue of the cause having been changed, the plaintiff obtained judgment for \$1,000, from which the defendants have appealed to this court. Besides the usual errors assigned are the following: First, that the petition does not state facts sufficient to constitute a cause of action. Second, that error was committed by the court in refusing to strike out parts of replication. Third, that the court erred in admitting illegal evidence, and in giving improper and refusing proper instructions.

[Omitting other points.]

It is insisted that the third instruction in which the jury were, in effect, told that if plaintiff was a gratuitous passenger, such fact constituted no defense, and if they believed that in consideration of plaintiff notifying defendants by telegraph before the arrival of trains at Lexington of the number of persons therein who would require transportation from the depot, defendants allowed plaintiff to ride in their hacks without paying fare, that then plaintiff was not a gratuitous passenger. It is claimed that this instruction should not have been given, because there was no evidence on which to base it, and because it does not assert a correct principle. Mr. Chanslor, one of the defendants, in his evidence states that the conductor would sometimes telegraph for extra hacks; that he had told his men not to charge the conductor or railroad men. Plaintiff, in his evidence, states that he was in the habit of telegraphing to defendants before the arrival of his train the number of persons who would be likely to require carriage by them. This, we think, was sufficient to authorize the instruction. The principle announced in it, that although plaintiff might have been a gratuitous passenger, such

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fact constituted no defense, is supported by all the authorities which have come under our observation. While in some of them intimations are made that in the case of a gratuitous passenger, the carrier may only be liable for gross negligence, it has not been held in any of them that such fact would exempt the carrier from all liability. On the contrary, the weight of authority favors the doctrine of holding the carrier of passengers to the same degree of diligence in all cases where one has been received as a passenger, on the principle that if "a man undertakes to do a thing to the best of his skill, when his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence." *Shiells v. Blackburne*, 1 H. Bl. 115, 158; 2 M. & W. 143. In the case of *Philadelphia & Read. R. R. Co. v. Derby*, 14 How. 468, it was held that "if plaintiff was lawfully on defendant's railroad at the time of the collision, and the collision and consequent injury to him were caused by the gross neglect of one of the servants of defendant then employed on the road, he was entitled to recover, notwithstanding the circumstance that he was a stockholder in the company, and was riding by invitation of the president, paying no fare, and not in the usual passenger car." It was also observed that "when carriers undertake to convey persons by the powerful and dangerous agency of steam, public policy requires that they should be held to the greatest possible care and diligence, and whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless servants. Any negligence in such cases may well deserve the epithet of gross." This case was followed in the case of *Indianapolis R. R. Co. v. Horst*, 93 U. S. 291; *Steamboat New World v. King*, 16 How. 469; *New York Cent. R. R. Co. v. Lockwood*, 17 Wall. 357.

In section 528, Angell on Carriers, it is said that "the circumstance that the passenger is a steamboatman, and as such is carried gratuitously, does not deprive him of the right of redress enjoyed by other passengers." If the above authorities go no further, they at least conclusively settle the question that a gratuitous passenger can recover for an injury occasioned by the gross neglect of the carrier, and also, that in such cases any negligence is gross negligence. This latter principle has been recognized by this court in the case of *McPheeters v. Hann. & St. Jo. R. R. Co.*, 45 Mo. 26, in which WAGNER, J., observes that "counsel for appellant laid

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great stress on the assumption that gross negligence should be proved before defendant could be held liable. In England it is now the course of adjudication, and definitely settled, that there is no difference between negligence and gross negligence, the latter being nothing more than the former with the addition of a vituperative epithet." The cases of *Ready v. Steamboat Highland Mary*, 17 Mo. 461, and *Gray v. Mo. River Packet Co.*, 64 id. 47, to which we have been cited, do not apply. In the former the only point decided was that "negligence is not a conclusion of law simply from the fact that a boat passed a dangerous point in the river, known to be difficult to pass in the night." In the latter case the principle contended for by defendants was said to be correct when applied to a mere mandatory as contradistinguished from a common carrier.

Judgment affirmed.

REINDERS V. KOPPELMANN.

(68 Mo. 482.)

Will — devise for life — implied power to sell.

A devise for life is not enlarged to a fee by a subsequent implied power to sell.

PARTITION. The opinion states the facts. The defendants had judgment below.

Hitchcock, Lubke & Player, for appellants.

A. J. P. Garesche and *Jeff. Chandler*, for respondent, argued that the widow took a life estate, enlarged by the power of sale into a fee, citing *McKenzie's Appeal*, 41 Conn. 607; s. c., 19 Am. Rep. 525; *Attorney-General v. Hall*, Fitzg. 314; *Jackson v. Fitzsimmons*, 10 Johns. 20; *Ramsdell v. Ramsdell*, 21 Me. 288; *Harris v. Knapp*, 21 Pick. 416; *Homer v. Shelton*, 2 Metc. 202; 2 Story's Eq. Jur., § 1073; *Wright v. Atkins*, 17 Ves. 255; 2 Hill. on Real Prop. 581; *Carr v. Dings*, 58 Mo. 405; 2 Redfield on Wills, 659, note 56; *Executors v. Seeger*, 6 C. E. Green, 90; *Carter v. Reddish*, 5 Cent. Law Jour. 492; *Brant's Will*, 40 Mo. 279; *Davis v. Bagg*, 20 Ohio St. 566.

NAPTON, J. The principal questions discussed in this case involve the proper construction of the will of Koppelman, which is as follows :

The object of all courts in the construction of a will is to ascertain the intention of the testator, where it is possible. It unfortunately happens that where wills are written by persons unskilled not merely in law but in the language in which their intentions are expressed, there are found such contradictory clauses as render it

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exceedingly difficult to ascertain what is the leading, prominent and controlling object of the will. In such cases courts have established some rules, and some exceptions to them, by which they will be guided — all of them with a view to give effect to the intentions of the testator, as gathered from the entire will.

In this case, the will of Koppelman gives to Mrs. Koppelman all his estate, real and personal, for and during her life-time. In a succeeding clause she is impliedly authorized to sell any part of his real estate after the lapse of twenty-five years to enable her to carry on his copartnership business and to educate the adopted daughter. The property left on the decease of his wife he then directs to be given to certain persons, clearly designated. It is insisted that this power impliedly given to sell the real estate enlarges her interest in it from a life estate to a fee. The answer to this may be best given in the language of Sir Wm. GRANT, in *Bradly v. Westcott*, 13 Ves. 445: "The distinction is perhaps slight, which exists between a gift for life with a power of disposition superadded, and a gift to a person indefinitely with a superadded power to dispose by deed or will. But the distinction is perfectly established, that in the latter case the property vests. A gift to A and such persons as he shall appoint is absolute property in A without any appointment; but if it is to him for life, and after his death to such person as he shall appoint by will, he must make an appointment in order to entitle that person to any thing." The same judge decided in the case of *Barford v. Street*, 16 Ves. 135, that where there was a gift for life to A, with a power of appointment by deed, or writing or will, A had the entire estate. "An estate for life with an unqualified power of appointing the inheritance," said the master of the rolls, "comprehends every thing. By her interest she can convey her life estate. By this unlimited power she can appoint the inheritance. The whole fee is then subject to her disposition." It will be observed in reference to this last decision, which upon a cursory view might seem to conflict with the first, that although the devisee is given an express estate for life, yet by subsequent clauses an unlimited power of disposition is given her either by deed or will, and for no specific object. A party cannot give an unlimited dominion of his property to one and at the same time a limited right in it to another; in other words, a remainder cannot be engrafted on a fee.

The distinction taken in *Bradly v. Westcott* is recognized by

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this court as early as the case of *Rubey v. Barnett*, 12 Mo. 1, and subsequently in *Gregory v. Cowgill*, 19 id. 415, and *Green v. Sutton*, 50 id. 190. It is also distinctly announced in *Jackson v. Robins*, 16 Johns. 587. The result is that where there are inconsistent devises the courts are compelled in some cases to enlarge, in others to cut down the estate, in order to carry out the leading and prominent objects of the testator as indicated by a view of the entire will and all its various provisions. In the present case, however, there is no necessity for enlarging the estate for life, given to Mrs. Koppelman, into a fee in order that she may sell a part or the whole of the real estate if the manufacturing business in which Koppelman was a copartner required it, since such a power may well co-exist with an estate for life in Mrs. Koppelman. Admitting that the prohibition against any sale for twenty-five years may be regarded as though it had been only for one year, or had been entirely omitted, the power to sell was limited to a specific purpose and was unaccompanied with a power to dispose of by devise. On the contrary, the property thus left at the death of the wife was devised specifically to his adopted daughter and the heirs of his wife and himself, in certain proportions named, and the estate consisted of personal property as well as realty. In the case of *Gregory v. Cowgill*, 19 Mo. 415, an express estate for life was given to the devisee without any power of disposition either by deed or will, except what might be implied by the words in the devise over which were "what remains of my estate, both real and personal, after the death of my wife," and it was held that an express estate for life could not be converted into a fee by words of mere implication, unless the general intent of the testator required it. In that case there was no express power given the devisee to sell; in the case now before us such a power may be inferred from the third clause of the will, and the words in the fourth clause, "the property then left," may very well include the personal and real property not disposed of under the power in the third clause.

The case of *Ramsdell v. Ramsdell*, 21 Me. 288, is cited as an authority conflicting with these views, but we do not so understand it. Judge SHEPLEY states it to be a settled rule of law that if the devisee have the absolute right to dispose of the property at pleasure, the devise over is inoperative, but that where the testator gives the first taker an estate for life only by express words and annexes to it a power of disposal on a certain event or for a

certain purpose, the life estate is not thereby enlarged into a fee.* In that case there was no express estate for life given to the wife, except in regard to certain plate and jewels, and the will was construed to give her an absolute estate in the land on the strength of the words "if any remains" in the devise over. At the same time the court distinctly recognized the doctrine of *Bradly v. Westcott*.

In *Harris v. Knapp*, 21 Pick. 416, the will provided, after directing the sale of all the real estate of testatrix and the payment of her debts, that what remained of real and personal estate should be given, one-half to her daughter M. (a married woman), for her use and disposal during her life, and whatever remained at her death to M.'s two daughters. This was held to be not merely a bequest of the income of one-half of such residuary fund during her life, but that M. might, in her life-time, dispose of the principal either in whole or in part. The case seems to have been decided on the principles announced by Sir Wm. GRANT in *Barford v. Street*. The bequest was confined to personal estate, and the only question was whether the words "for her use and disposal during her life" limited her to the income of this fund, or gave her a power to dispose of the entire property at pleasure, provided it was done during her life. The court adopted the latter view, and as such a disposition had been made by her and her husband, its validity was sustained.

In *Davis v. Boggs*, 20 Ohio St. 550, the testator bequeathed to his wife "in trust only and during her natural life only" certain rents of real estate, interest on debts due him and dividends on his bank stock, with a proviso that the debts and bank stock should not be diminished. The only question in that case was, whether the legatee took an absolute beneficiary interest in these dividends, or only a trust estate in them, and the court held that, looking into the entire will, it was plain that the testator did not use the words "in trust only" in their technical sense, and that they must be rejected as unmeaning, and that the wife took an absolute property in the dividends, rents and interest so bequeathed to her. So that in this case a trust estate was raised to a beneficial one, as in *Baxter v. Bowyer*, 19 Ohio St. 490, the same court cut down a fee simple to a life estate — both on the same principle, that looking through the entire will and finding other provisions entirely incon-

* To same effect, *Jones v. Bacon* (68 Me. 34), 28 Am. Rep. 1.

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sistent with such clauses, they were necessarily rejected or modified in order to carry out the general intent of the testator.

In regard to the will now under consideration, although obviously written by one more accustomed to a foreign language than our own, we do not find any difficulty in reconciling the life estate of the wife, which is very clearly given her, in all of his property of every description, with the subsequent clauses in which we assume that a power to sell the real estate is given her, manifestly with great reluctance, and restricted to specific purposes and postponed to a very remote period. Such a power we have seen from the current of authorities, only a few of which I have referred to, and those chiefly such as the counsel for plaintiff have argued as maintaining a different doctrine, does not, of itself, enlarge a life estate given in terms to a fee. It is not material in the present action, which is for a partition, whether this power of sale of the real estate is properly inferable from the terms of the third clause of the will or not. Mrs. Koppelman has remarried, never has exercised the power, has conveyed all her interest in the estate to Eugene D. Garesche, and Mr. Garesche has conveyed it to the plaintiff, Reinders, now the husband of Mrs. Koppelman. So that the only importance it has is in connection with its effect upon the proper construction of the second clause in the will, and we are satisfied that it does not enlarge the life estate given in this clause to a fee.

[Omitting other questions.]

Judgment affirmed.

CHOUTEAU INSURANCE CO. V. HOLMES' ADMR.

(§8 Mo. 601.)

Corporation — meeting of directors — when notice presumed.

A quorum of the directors of a corporation having attended a special meeting, it will be presumed *prima facie* that all the directors were duly notified to attend.

SUIT to recover assessments on a stock-note given by Nehemiah Holmes, deceased, to the plaintiff company. The assessments were ordered at special meetings of the board of directors, at which a quorum was present. There was no evidence to show that notice

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of the meetings was given to the directors. Plaintiff had judgment.

Gage & Ladd, for appellant.

R. A. Frame and *B. Wells*, for respondent.

HENRY, J. It does not appear by express evidence that notices of the special meetings of the board of directors, at which the assessments were made, were given to the directors, although it does appear that a quorum of the directors was present and made the assessments. Nor was any evidence introduced or offered to show that notices were not given. That all the directors must be notified of a special meeting of the board is conceded; but the question for determination is, whether if the meeting be held and a quorum be present, it will be presumed, in the absence of evidence to the contrary, that such notice was given, and all steps taken necessary to constitute it a regular and valid meeting of the board. In *Sargent v. Webster*, 13 Metc. 504; *Lane v. Brainerd*, 30 Conn. 577, and *McDaniels v. The Flower Brook Manuf. Co.*, 22 Vt. 274, it was decided that such would be the presumption. In *Sargent v. Webster* the court observed: "Another objection of the same kind is, that it does not appear that notice of the meeting was given to all the directors. But the contrary does not appear; and it would be hazardous to decide that every vote passed by an aggregate body is void, if it do not appear by the record that all were present. We believe it is not usual, in corporate records, to state how the members were notified. The presumption, "*omnia rite acta*," covers multitudes of defects in such cases, and throws the burden of proof upon those who would deny the regularity of a meeting, for want of due notice to establish it by proof." The doctrine thus declared was as distinctly announced in the other cases above cited, and also in *State ex rel. Bornefeld v. Kupferle*, 44 Mo. 155.

For a contrary doctrine appellant relies upon the *State v. Ferguson*, 31 N. J. L. 124; *Stow v. Wyse*, 7 Conn. 215; *Wiggin v. The Free Will Baptist Church*, 8 Metc. 301; *People v. Batchelor*, 22 N. Y. 128; *Atlantic Mut. Ins. Co. v. Fitzpatrick*, 2 Gray, 279, and *People's Ins. Co. v. Westcott*, 14 id. 440, in all of which it affirmatively appears either that no notice or an insufficient notice had been given of the directors' or corporation meeting, the proceedings of which were complained of. In the *State v. Ferguson* the court said: "The

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fifth man was not present, nor was he notified of the meeting." It appeared that the fifth township committeeman had not been notified of the meeting, and of course the presumption of the existence of a fact which it was proved did not exist, could not be indulged. So in the *Atlantic Delaine Co. v. Mason*, 5 R. I. 463, it affirmatively appeared that Hill, Carpenter & Co. had no notice of a meeting of stockholders at which an assessment on stock had been made. In *Stow v. Wyse*, 7 Conn. 214, parol evidence was admitted to prove that persons named in the vote at a meeting which authorized the execution of a deed for a company, convened and passed that vote without any notice to the other members of the company. In *Wiggin v. The Free Will Baptist Church*, 8 Metc. 301, there was evidence of notice, but the notice given was held insufficient. In *People v. Batchelor*, 22 N. Y. 128, the court based its opinion upon the fact, which was shown by evidence, that the absent alderman had no notice of the meeting of the board. The case of *Atlantic Mut. Fire Ins. Co. v. Fitzpatrick*, 2 Gray, 279, does seem to militate against the cases cited in 13 Metc., 3 Conn. and 22 Vt., but there is a very meager statement of the facts, and the opinion on this point is brief and cites no authorities. The case in 13 Metcalf is not mentioned, although two of the four judges then on the bench were members of the court when the case in 13 Metcalf was decided. It certainly was not intended to overrule that case, and it is difficult to determine from the report of the case in 2 Gray, what precise question was before the court. *People's Ins. Co. v. Wescott*, 14 Gray, 440, does not support a different doctrine from that held in 13 Metcalf. It turned on the validity of a by-law passed at a special meeting of the company held in pursuance of a notice duly published, "for the purpose of making alterations in the by-laws, and for the transaction of such business as may come before them." At the meeting thus held, the by-laws were altered by making four directors a quorum instead of five, and seven additional directors were chosen. Four of the seven thus chosen were the only directors who were present at the directors' meeting by which the assessment was made. The court, HOAR, J., said: "But a decisive objection to the choice of these new directors is, that in the call for the meeting at which they were chosen there was no intimation of any purpose to make such election." Expressing a doubt as to the right of the company to elect directors, except at their annual meetings, he added: "No vote to in

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crease the number of directors had been passed at any meeting held for such a purpose." It will be observed that there was a notice, but the court held the notice insufficient and the election void.

We think that the weight of authority on this question is to the effect that notice of a special meeting of the directors of a corporation will be presumed, in the absence of evidence showing that no notice was given. The instructions of the court are open to criticism, but the only one containing a serious error is that given for defendant, as follows: "That there is no evidence in this case to show that either of said meetings was called by the president, or that notice of either of them was, in any way, given to all the members of the board of directors." If we have correctly stated the law, competent proof of the meeting of a quorum of the board is *prima facie* evidence that it was called by the president, if such a call were necessary, and that notice of the meeting was given to all the directors. No error materially affecting the merits of the controversy was committed by the court, and the only serious error was on the side of appellant in the instruction given for him, of which he cannot complain. The judgment is affirmed.

The other judges concur.

HOUGH, J., not sitting, having been of counsel.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

HEARD V. DUBUQUE COUNTY BANK.

(8 Neb. 10.)

Negotiable instruments — what words destroy negotiability — special indorsement.

A promissory note is not rendered non-negotiable by the addition of these words: "The express condition of the sale and purchase of this Ohio reaper and mower No. — is such that the title, ownership, or possession does not pass from the said McDonald & Co. until the note and interest is paid in full. That the said McDonald & Co. have full power to declare this note due and take possession of said machine at any time they may deem themselves insecure, even before the maturity of the note."

The payee of a promissory note wrote his name on the back, under the following words: "For value received I hereby guarantee payment of the within note and waive presentation, protest, and notice," signed by the payee. *Held*, that this operated as an indorsement with an enlarged liability.

ACTION on a promissory note. The opinion states the facts. The plaintiff had judgment below.

Saxon & Snell, for plaintiffs in error, cited *Austin v. Burns*, 16 Barb. 643; *Edwards on Bills*, 136; *Samstag v. Conley*, 64 Mo. 476; *Bank of Trenton v. Gay*, 63 id. 33; 1 Pars. on Notes and Bills, 37; 2 id. 117; *Nicholson v. Bank*, 3 S. L. R. 953; *Woods v. North*, 84 Penn. St. 407.

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Slocumb & Hambel, for defendant in error.

COBB, J. Suit was brought in the court below by the defendant in error against the plaintiff in error on a promissory note in these words :

“ \$60.

BEATRICE, Neb., *July 19, 1876.*

For value received, on or before the 1st day of January, 1878, I, the subscriber, of P. O. Fairbury, county of Jefferson, State of Nebraska, severally promise to pay to the order of V. J. Williams & Co. Sixty dollars at the office of Bank in Fairbury, with interest at 10 per cent per annum from date until paid, and if suit is brought to enforce collection I will pay reasonable attorneys' fees. * * * The express condition of the sale and purchase of this Ohio reaper and mower No. — is such that the title, ownership, or possession does not pass from the said McDonald & Co. until this note and interest is paid in full. That the said McDonald & Co. have full power to declare this note due and take possession of said machine at any time they may deem themselves insecure even before the maturity of the note.

A. L. HEARD,

S. H. HEARD,

M. E. HEARD.♥

The note was indorsed as follows :

“ For value received, I hereby guarantee payment of the within note and waive presentation, protest, and notice.

V. J. WILLIAMS & Co.”

A trial was had to a jury and judgment for the plaintiff. To reverse which the cause is now brought to this court on error.

Plaintiffs in error present three points :

[Omitting the first.]

2. That the character of said note as a negotiable instrument is destroyed by reason of its containing a recital of the conditions upon which a certain Ohio reaper and mower was sold and purchased, and providing that the title, ownership, or possession thereof does not pass from McDonald & Co. until said note is paid in full, etc., said McDonald & Co. not being parties to said note.

3. That the said note never was in fact negotiated. The guaranty written upon the back thereof not amounting to an indorsement so as to transfer the title.

[Omitting discussion of first point.]

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On the second point, none of the numerous authorities cited seem to be in point. The law seems to be well settled that although it may appear on the face of the note that its payment is secured by collaterals in personal property or mortgage of real property, yet if otherwise in proper form it is nevertheless negotiable. *Arnold v. R. R. V. U. R. R. Co. et al.*, 5 Duer, 207, and cases there cited. *Collins v. Bradbury*, 64 Me. 37, and cases there cited.

But it is urged that the case at bar is distinguishable from all these cases in this, that the sole consideration for the giving of the note by the plaintiffs in error was the sale of a certain Ohio reaper and mower, and that when it appears on the face of the note that neither title, ownership, or possession of said Ohio reaper and mower passed from the said McDonald & Co. until said note and interest should be paid in full, that the same was notice to defendant in error and all the world that the said note was without consideration, etc. Were the premises true the conclusion would be pressing, but an examination of the note will fail to disclose that the sale of an Ohio reaper and mower was the sole or any part of the consideration for the giving of the note. The most that can be claimed is that these words in the note were enough to put a person about to receive the note, in the course of business, upon his inquiry, and following the New York decisions, we do not deem it sufficient evidence of warranty of the quality of the machine by the vendor to the vendee.

In *Magee v. Badger*, 34 N. Y. 247, PORTER, J., says: "He, the purchaser, is not bound at his peril to be upon the alert for circumstances which might probably excite the suspicions of wary vigilance. He does not owe the party, who puts negotiable paper afloat, the duty of active inquiry to avert the imputation of bad faith." *White v. Vermont & M. R. R. Co.*, 21 How. 575; *Gelpcke v. City of Dubuque*, 1 Wall. 175, and cases there cited; *Collins v. Bradbury*, 64 Me. 37; *Mabie v. Johnson*, 15 N. Y. Sup. Ct. 309.*

On the third point, we find some conflict of authorities, but we adopt the law and the language of DAY, C. J., in *Robinson v. Lain*, 31 Iowa, 9: "We confess ourselves unable to give effect to the contract of guaranty of payment and waiver of demand and notice, if the payees intend to retain the title. The writing simply constitutes an indorsement with an enlarged liability." See *Crosby v. Roub*, 16 Wis. 616; *Hance v. Miller*, 21 Ill. 636; *Crenshaw v. Jack-*

* See *Kelley v. Whitney*, ante, p. 697.

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son, 6 Ga. 509 ; *Myrick v. Hasey*, 27 Me. 9 ; *Partridge v. Davis*, 20 Vt. 499 ; *contra* — *Tuttle v. Bartholomew*, 12 Metc. 452 ; *Taylor v. Binney*, 7 Mass. 479 ; *Blakely v. Grant*, 6 id. 386 ; *True v. Fuller*, 21 Pick. 140 ; *Upham v. Prince*, 12 Mass. 14.

[Omitting a question of practice.]

Judgment affirmed.

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(8 Neb. 68.)

Damages — exemplary in action of assault.

In an action of assault and battery exemplary damages are not proper.*

ACTION of assault and battery. The opinion states the facts. The plaintiff had judgment below.

Hunter & Sawyer, for plaintiff in error.

Lamb, Billingsley & Lambertson, for defendant in error. Exemplary damages, or damages beyond compensation for the injury done, are recoverable in an action for assault and battery, especially when the injury is attended with circumstances of aggravation, or when malice and oppression appear. A previous conviction and fine for an assault and battery is no bar to the recovery of exemplary damages in a civil action for the same assault and battery. *Wiley v. Keokuk*, 6 Kans. 94 ; *Ward v. Ward*, 41 Iowa, 686 ; *Cook v. Ellis*, 6 Hill, 466 ; *Roberts v. Mason*, 10 Ohio St. 277 ; *Sedg. on Dam.* (6th Ed.) 569 ; *Fry v. Bennett*, 4 Duer, 247 ; *Smithwick v. Ward*, 7 Jones, L. R. 64 ; *Johnston v. Crawford*, Phillips' L. R. 342 ; *Hoadley v. Watson*, 45 Vt. 289 ; s. c., 12 Am. Rep. 197 ; *Hendrickson v. Kingsbury*, 21 Iowa, 379 ; *Field on Dam.*, § 89, p. 105 ; *McWilliams v. Bragg*, 3 Wis. 424 ; *Birchard v. Booth*, 4 id. 67 ; *Malone v. Murphy*, 2 Kans. 261 ; *Chiles v. Drake*, 2 Metc. (Ky.) 146 ; 3 Johns. 64 ; 14 id. 352 ; 4 Seld. 462.

COBB, J. This was an action of trespass for an assault and battery, brought by the defendant in error against the plaintiff in error,

*To same effect, *Hayner v. Cowden* (37 Ohio St. 202), 23 Am. Rep. 302.

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originally in the county court, and carried to the District Court of Lancaster county by appeal, where there was a trial to a jury and a verdict and judgment for two hundred dollars in favor of the plaintiff below, and brought to this court by petition in error on exceptions to the charge of the judge.

The following instructions were given at the request of defendant in error, and excepted to by plaintiff in error:

1. The defendant admits that he committed the assault and battery charged upon the plaintiff. Your verdict should therefore be for the plaintiff.

2. In assessing the amount of damages which the plaintiff should recover, if you find that the defendant acted deliberately and maliciously, you should recompense the plaintiff for — *First*, his mental suffering, the insult effected and the sense of degradation felt by the plaintiff; *Second*, you should also give compensation for the pain suffered by the plaintiff consequent on the beating; *Third*, you should also take into account the place where the defendant beat the plaintiff, whether it was a public place; the injury to the plaintiff's social standing. The fact that Mr. Boyer has been fined by Justice TAYLOR for the assault and battery complained of in this action will not bar a recovery for damages in this action. In addition to compensating plaintiff for injury actually committed, you may assess other damages as of a punitive or exemplary character.

It appears from the pleadings certified in the record that before the commencement of said action, the plaintiff in error was arrested and taken before a justice of the peace and fined for the said assault and battery, and that he paid the fine; the *bona fides* of which proceeding was, however, denied by the defendant in error.

The only question presented to this court is upon the second instruction and the last paragraph of it, upon which the plaintiff in error makes the point that where the civil action is based upon acts which constitute a crime under the laws of the State punishable by fine or imprisonment, no punitive or exemplary damages can be allowed in the civil action.

Whatever views this court may arrive at upon this question, it will be a hopeless task to endeavor to reconcile them either with the adjudicated cases, or the conclusions of eminent text writers of either this country or England, for so far as we have been able to examine them they are pretty evenly divided both in numbers and weight of authority.

Some of the courts express regret at being compelled by force of precedent to hold in favor of allowing punitive damages in similar cases, while were it a new question, their judgment would condemn it.

In a late case the Supreme Court of Wisconsin, through Chief Justice RYAN, uses the following language in a case exactly in point: "The argument and consideration of this case have gone to confirm the present members of this court in their disapprobation of the rule of exemplary damages, which they have inherited. But they fear to complicate the difficulties and incongruities of the rule by the exception urged, and do not feel at liberty to change or modify the rule at so late a day against the general authority elsewhere. As suggested in *Bass v. Railway Co.*, 36 Wis. 450; s. c., 17 Am. Rep. 495; 42 Wis. 654; 24 Am. Rep. 437, if a change should now be made it lies with the legislature rather than the court to abrogate or modify a rule running through the entire body of the reports of the State. As was once well observed, courts cannot be always inquiring into the original justice or wisdom of rules long established and accepted." *Brown v. Swineford*, 44 Wis. 282; s. c., 28 Am. Rep. 582.

Mr. Justice FOSTER in his exhaustive opinion in *Fay v. Parker*, 53 N. H. 342; s. c., 16 Am. Rep. 270, says, speaking of punitive damages: "Now why all this unnecessary trouble, confusion, and perplexity, when the course of procedure should be plain, straight, and uninterrupted? The true rule, simple and just, is to keep the civil and the criminal process and practice distinct and separate. Let the criminal law deal with the criminal, and administer punishment for the legitimate purpose and end of punishment, namely, the reformation of the offender and the safety of the people. Let the individual whose rights are infringed and who has suffered injury go to the civil courts and there obtain full and ample reparation and compensation; but let him not thus obtain the 'fruits' to which he is not entitled and which belong to others. Why longer tolerate a false doctrine which in practical exemplification deprives a defendant of his constitutional right of indictment or complaint on oath, before being called into court — deprives him of the right of meeting the witnesses against him face to face — deprives him of the right of not being compelled to testify against himself — deprives him of the right of being acquitted unless the proof of his offense is established beyond all reasonable doubt —

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deprives him of the right of not being punished twice for the same offense? Punitive damages destroy every constitutional safeguard within their reach. And what is to be gained by this annihilation and obliteration of fundamental law? The sole object in its practical results seems to be to give a plaintiff something which he does not claim in his declaration. If justice to the plaintiff required the destruction of the Constitution there would be some pretext for wishing the Constitution were destroyed. But why demolish the plainest guaranties of that instrument and explode the very foundation upon which constitutional guaranties are based for no other purpose than to perpetuate false theories and develop unwholesome fruits? Undoubtedly this pernicious doctrine 'has become so fixed in the law,' to repeat the language of Mr. Justice CAMPBELL, of Michigan, 'that it may be *difficult* to get rid of it. But it is the business of courts to deal with difficulties; and this heresy should be taken in hand without favor, firmly and fearlessly.' It was once said 'If thy right eye offend thee pluck it out. * * and if thy right hand offend thee cut it off,' wherefore not reluctantly should we apply the knife to this deformity, concerning which every true member of the sound and healthy body of the law may well exclaim, 'I have no need of thee.'"

To this court the question of punitive, vindictive, or exemplary damages is *tabula rasa*, it now being presented for the first time. And being thus called upon to lay the foundation for future adjudications on this subject in this State, we are warned to avoid a line of construction which seems to have been the fruitful source of so much difficulty elsewhere, and to follow those precedents and authorities which are the most satisfactory to our judgment, and which do not seem to have led to any embarrassing complications in their administration.

Mr. Justice METCALF says "whether exemplary, vindictive, or punitive damages — that is damages beyond a compensation or satisfaction for the plaintiff's injury — can ever be legally awarded as an example to deter others from committing a similar injury, or as a punishment of the defendant for his malignity or wanton violation of social duty in committing the injury which is the subject of the suit, is a question upon which we are not now required nor disposed to express an opinion. The arguments and the authorities on both sides of this question are to be found in 2 Greenl. on Ev., tit. Damages, and Sedg. on Dam. 39 *et seq.* If such damages are

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ever recoverable we are clearly of the opinion that they cannot be recovered in an action for an injury which is also punishable by indictment, as libel and assault and battery. If they could be, the defendant might be punished twice for the same act." *Austin v. Wilson*, 4 Cush. 273.

The Supreme Court of Indiana says: "Taber was liable to indictment for the assault and battery charged in this action, and damages could not therefore be given beyond a compensation for the plaintiff's injury. He was not, it is true, confined to the proof of actual pecuniary loss; the jury might have taken into consideration every circumstance of the act which injuriously affected the plaintiff, not only in his property, but in his person, his peace of mind—in short, in his individual happiness. But we think the jury had no right, as charged by the Circuit Court, to give such additional damages as would tend to prevent such conduct, and give peace and security to private rights and the community in general." *Taber v. Hutson*, 5 Ind. 322.

The late venerable SIDNEY BREESE, in an action brought by a woman against a brewer for damages for selling her husband beer on Sunday and making him drunk, uses the following language: "Again this court held in *Freese v. Tripp*, *supra*, that damages could not be awarded by way of punishment of the seller, as the law has provided for that by indictment, to be followed by fine and imprisonment. 'Vengeance is mine,' saith the law. * * * If appellant's conduct was in violation of law and outraged the public, the public have their remedy by indictment, and punishment of the guilty will assuredly follow. Can the law be said to be vindicated by putting money in the pockets of an individual under the claim of a real or fancied wrong done by another?" *Albrecht v. Walker*, 73 Ill. 69.

Approving as this court does of the law as laid down in the above cases, we cannot approve of the latter clause of the second charge given by the District judge on the trial of this cause, and for that reason there must be a new trial.

Reversed and remanded.

State ex rel. Abbott v. Dodge County.

STATE EX REL. ABBOTT V. DODGE COUNTY.

(8 Neb. 124.)

Constitutional law — delegation of power to make local improvements and assess the expense.

A constitutional provision that "the legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments, or by taxation of property benefited," does not prohibit the legislature from conferring the power to make such improvements in like manner upon other municipal corporations.

APPPLICATION for a peremptory writ of mandamus commanding the defendants to lay out and establish a ditch or drain for the purpose of draining certain lands described in the application, in accordance with the authority vested in the defendants by statute. The opinion states the case.

W. A. Marlow, for relator, cited *Cooley on Taxation*, 16; *French v. Teschemaker*, 24 Cal. 518; *Duncombe v. Prindle*, 12 Iowa, 1; *The Iowa Homestead Co. v. Webster County*, 21 id. 221; *Roosevelt v. Godard*, 52 Barb. 533; *Bigelow v. West Wisconsin Railway*, 27 Wis. 479; *Emery v. S. F. Gas Co.*, 28 Cal. 346; *Scovill v. The City of Cleveland*, 1 Ohio St. 126; *Hill v. Higdon*, 5 id. 243; *Dill on Munic. Corp.*, § 599, and authorities there cited; *Hurford v. City of Omaha*, 4 Neb. 344; *Cooley on Taxation*, 416, and authorities there cited.

Marshall & Sterrett, for respondents, cited the various sections of the Constitution of Illinois upon the subject, comparing them with the provisions of the Constitution of Nebraska and the following: *People v. Marshal*, 1 Gilm. 672; *Harward v. St. Clair Drain Co.*, 51 Ill. 133; *Sedgwick on Const. Law* (2d ed.), 200. note a; *Cooley on Const. Lim.* 58; *Updike v. Wright*, 81 Ill. 53.

MAXWELL, C. J. The only question for our consideration is the proper construction to be given to section 6, article 9, of the Constitution of 1875, which is as follows: "The legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments, or by special taxation of the property benefited. For all other corporate pur-

poses all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

The fifth section of article 9 of the Constitution of 1848, of Illinois, provided that "the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

In *Harward et al. v. St. Clair Drain Co.*, 51 Ill. 130, a suit in equity was instituted to restrain the collection of certain taxes or assessments levied by certain commissioners appointed under the provisions of "an act to provide for the constructing of a levee from Prairie Dupont village, in St. Clair county, to Harrisonville, in Monroe county." It was held that the section was designed to prevent the delegation of the taxing powers to any person or persons other than the corporate authorities of the municipality to be taxed. It was also held that it was "a just inference that the purpose of the section was to define the class of persons to whom the right of taxation might be granted, and the purposes for which it might be exercised, and when the legislature seeks to grant it to any other than corporate authorities, or for corporate purposes, it transgresses the limit of its power."

It was suggested that the legislature could authorize drainage commissioners to be elected by the people of the several counties, with power to determine each year the sum to be expended in the construction of levees, and to assess such sum as a tax upon the lands to be benefited thereby to the extent of the benefits conferred. To the same effect is *Hessler v. The Drainage Commissioners*, 53 Ill. 105; *Gage v. Graham*, 57 id. 144; *Board of Directors v. Houston*, 71 id. 318.

Section 9 of article 9 of the Constitution of 1870, of Illinois, provides that "the general assembly may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessments or by special taxation of contiguous property or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

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In *Updike v. Wright*, 81 Ill. 53, it was held that "the clause in the present Constitution, like that in the Constitution of 1848, must be construed as a limitation on the power of the legislature. Giving it that construction, the general assembly can only vest cities, towns and villages with power to make local improvements by special assessments or special taxation upon contiguous property benefited by such improvements. By necessary implication it is inhibited from conferring that power upon other municipal corporations or upon private corporations."

It appears from the statement of facts in that case that the commissioners had undertaken to construct a levee costing thousands of dollars, at a certain point on the Wabash river, not in connection with a system of drainage, but as a principal work. The court say: "But it is nowhere intimated in the statute the owners or occupants of land may undertake, under the provisions of this law, the building and maintenance of an immense levee on the borders of river, not connected with any system of drainage by ditches. Neither the Constitution nor the statute contemplates any such work." It is clear, from the statement of facts, that the only question before the court was the authority to construct the levee. The decision, therefore, upon matters not involved in the case cannot be considered as an adjudication.

Is the power of the legislature limited by implication, upon the principle *expressio unius est exclusio alterius*? An examination of the Constitutions of other States and the adjudication of their courts thereon may throw some light upon this question.

Section 11, article 1 of the Constitution of Michigan, provides that: "The board of supervisors of each organized county may provide for laying out highways, constructing bridges, and organizing townships under such limitations and restrictions as shall be prescribed by law." It was held that the section is not by its terms exclusive, and does not preclude the legislature from conferring power over this subject on the *township* highway commissioners. *The People v. Highway Commrs.*, 15 Mich. 351; *The People v. Ingham Co.*, 20 id. 95.

Section 22, article 1 of the Constitution of 1857, of Iowa, provides that: "Foreigners who are or may hereafter become *residents of this State* shall enjoy the same rights in respect to the possession, enjoyment, and descent of property as native-born citizens." In 1858 an act was passed extending the rights in respect to the pos-

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session, enjoyment, and descent of property to others than those named in the Constitution. Under this statute a non-resident alien acquired title to certain real estate in 1859, and conveyed the same to the plaintiff in 1864. It was held that the section referred to contained no restriction on the power of the legislature to confer the same or other rights on non-resident foreigners. *Purcell v. Smidt*, 21 Iowa, 540.

In the case of *State v. Tait*, 22 Iowa, 140, it was held that the State, in a criminal trial before a justice of the peace, had a right to appeal to the District Court, as well as the defendant, notwithstanding the provisions of section 11, article 1, of the Constitution, giving "to the defendant the right of appeal;" that this provision was not by implication a denial of the right to the State.

The Constitution of Arkansas provides that: "All property shall be taxed according to its value, etc. * * * The general assembly shall have power to tax merchants, bankers, peddlers, and privileges in such manner as may be prescribed by law." It was held that this provision did not prohibit the legislature from authorizing counties and incorporated towns to impose a tax upon billiard tables, ten pin alleys, taverns, groceries, and the like for municipal purposes and as a police regulation for the preservation of good order. *Washington v. The State*, 13 Ark. 752; Dill on Mun. Corp., § 592.

The second section of art. XII of the Constitution of Ohio, provides that "laws shall be passed taxing, by a uniform rule, all moneys, etc., and also all real and personal property, according to its true value in money." By the sixth section of article XIII, the legislature are required to "provide for the organization of cities and incorporated villages by general laws, and to restrict their power of taxation, *assessment*, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such power." It was held that legislation authorizing cities and villages to levy special assessments, for the purpose of improving streets, upon real estate peculiarly and specially benefited, and in proportion to such benefit, was not repugnant to any provision of the Constitution. See, also, *Zanesville v. Richards*, 5 Ohio St. 589; *Baker v. Cincinnati*, 11 id. 534; *Bank v. Hines*, 8 id. 1.

The Constitution of California contains provisions that: "All property in the State shall be taxed in proportion to its value," and that "taxation shall be equal and uniform throughout the State,"

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and confers the power of taxation and assessment on municipal corporations. Under an act of the legislature, providing that the expense of street improvements shall be assessed on property fronting on the street in proportion to its frontage, it was held not to violate the provisions of the Constitution. *Burnett v. Sacramento*, 12 Cal. 76; *People v. Burr*, 13 id. 343; *Emery v. Gas Co.*, 28 id. 345; *Emery v. Bradford*, 29 id. 75; *Walsh v. Mathews*, 29 id. 123; *Taylor v. Palmer*, 31 id. 240; *Crosby v. Lyon*, 37 id. 242; *Chambers v. Satterlee*, 40 id. 497.

The Constitution of Indiana declares that "the general assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such rules and regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious, or charitable purposes, as may be specifically exempted by law." There is also a provision prohibiting the passage of local or special laws for the assessment and collection of taxes for State, county, township, or road purposes. It was held that these provisions do not prohibit an assessment upon property specially benefited by the improvement of a street, or other local improvements. *Goodrich v. Turnpike Co.*, 26 Ind. 119; *Bright v. McCullough*, 27 id. 223; *Palmer v. Stumph*, 29 id. 329.

The Constitution of Massachusetts requires the general court "to impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of and persons resident and estates lying within said Commonwealth." It was held that this provision was not violated by authorizing a town, in which the State agricultural college was located, to raise a tax and pay an exceptional portion of the expense. *Merrick v. Amherst*, 12 Allen, 500. Nor does it prohibit local, street or drain assessments being imposed on the property benefited. The court say: "We see no reason for construing the provisions in the Constitution, giving to the legislature the power of imposing proportional and reasonable assessments, rates, and taxes, as an inhibition on the levy of a tax for local purposes of a public nature, upon those who will reap the benefit on their estates of a proposed expenditure of money." *Dorgan v. Boston*, 12 Allen, 223.

The Constitution of Minnesota provides that "all taxes to be raised in this State shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation

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and be equal and uniform throughout the State." It was held that a special assessment on lands in proportion to the benefits received, from the construction of a public road, could not be made. *Stinson v. Smith*, 8 Minn. 366. Subsequently the constitution was amended authorizing such assessments.

The Constitution of Mississippi provides that "taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law." It was held that this provision did not prohibit the legislature from imposing a tax on a particular district for a local improvement, or from authorizing a municipal corporation from assessing the expense of a street improvement on the lots fronting on the street. *Williams v. Cammack*, 27 Miss. 209.

The Constitution of Missouri requires "all property subject to taxation to be taxed in proportion to its value." It was held that this provision did not prohibit assessments for street improvements on the basis of benefits conferred. *Garrett v. St. Louis*, 25 Mo. 505; *Uhrig v. St. Louis*, 44 id. 458.

The provision in the Constitution of Oregon that "all taxation shall be equal and uniform," was held not to preclude the improvements of streets by special assessments on the property benefited. *King v. Portland*, 2 Or. 146.

The Constitution of Wisconsin provides that "the rule of taxation shall be uniform," and that "it shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages, and to restrain their power of taxation and assessment." It was held that special assessments on the basis of benefits may be sustained under the latter provision. *Weeks v. Milwaukee*, 10 Wis. 242; *Lumsden v. Cross*, id. 282; *Cooley on Taxation*, 444.

Section 4, article VIII of the Constitution of 1867 of this State, provided that the "legislature shall provide for the organization of cities and incorporated villages by general law; and restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such power." In *Hurford v. The City of Omaha*, 4 Neb. 336, it was held that a statute authorizing a city to grade and improve streets, one-half of the expense to be paid by assessment on lots abutting thereon, was constitutional. The court say: "The question is not simply whether the theory of special assessments is sound in principle, or

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inequitable and unjust in its operation, but whether the legislature has power under the Constitution to establish such a system. Special assessments are said by an eminent jurist to be "a peculiar species of taxation, standing apart from the general burdens imposed for State and municipal purposes, and governed by principles that do not apply generally." Cooley on Taxation, 416.

In *Wright v. Boston*, 9 Cush. 233, 241, the court say: "All these municipal taxes for the improvement of streets rest for their final reason upon the enhancement of private properties."

In *Philadelphia v. Tryon*, 35 Penn. St. 401, Mr. Justice Woodward says: "Local impositions for grading, paving, sewerage and the like, have been many times sustained by this court, and are, in the long run, perfectly fair, for they enter into and enhance the value of the property assessed." See, also, *People v. Mayor of Brooklyn*, 4 N. Y. 419; *Brewster v. Syracuse*, 19 id. 116; *Howell v. Buffalo*, 37 id. 267; *Litchfield v. Vernon*, 41 id. 123; *Commonwealth v. Woods*, 44 Penn. St. 113; *Wray v. Mayor*, 46 id. 365; *Greensburg v. Young*, 53 id. 280; *Stroud v. Philadelphia*, 61 id. 255.

In *Hammett v. Philadelphia*, 8 Am. Law Reg. (N. S.) 422, the court say: "Local assessments can only be constitutional when imposed to pay for local improvements, clearly conferring special benefits on the property assessed, and to the extent of those benefits." This is undoubtedly the law in this State under our present Constitution, the statute pointing out the mode of levying the expense in proportion to the benefits which the estates respectively receive from the proposed improvement. The Constitution, by authorizing the legislature to vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments, or by special taxation of property benefited, thereby limits the power of the legislature. In the absence of such a restriction the rule of apportionment would be left entirely to the legislature.

In the case of *The B. & M. R. R. Co. v. Lancaster County*, 4 Neb. 304, in speaking of the specific road tax of \$4.00 per quarter section, the court say: "This apportionment is according to no just rule; it is arbitrary and operates oppressively; it imposes like burdens upon all lands, whether they be worth three or three hundred dollars per acre. * * * Hopeless indeed would be the task to show that such legislation is founded upon any fair or equitable principle whatever. These are considerations, which under the

Constitution in force when the taxes complained of were levied, could only be properly addressed to the legislature. It was for that body, not the courts, to determine what the rule of apportionment should be." And in the absence of constitutional restrictions, the legislature would have power to determine the rule of apportionment in assessments for local improvements. Under our present Constitution, assessments for local improvements in cities, towns, and villages, can only be made in proportion to the benefits received. As to the mode of ascertaining such benefits, it would be improper to determine in this case, as the question does not arise.

The authority of the legislature to vest cities, towns and villages with power to make local improvements by special taxation of property benefited is not a grant of power. The authority already existed, and the Constitution merely prescribes the rule by which taxes shall be apportioned. How then can it be claimed that the enumeration of cities, towns and villages excludes all other municipal corporations? If the Constitution was a grant of power, the rule contended for would be correct. But not being a grant of power, and the legislature possessing authority, in the absence of an inhibition in the Constitution to pass the act in question, it is not obnoxious to section 6 article 9 of the Constitution. And this is the rule laid down in the case of *The State v. Lancaster County*, 4 Neb. 540, where it is said: "The Constitution of a State, according to the rule which seems to be well settled, is not regarded as a grant but rather as a restriction of legislative power; and so in an inquiry as to whether a statute is constitutional, it is for those who question its validity to show that it is prohibited." In that case it was held that the taxing power of the legislature was not limited, in the absence of positive restrictions in the Constitution, to the objects and classes of business enumerated in that instrument. We adhere to that decision, and it is decisive in this case.

The precise question involved in this case has never, so far as we are advised, been before the Supreme Court of Illinois. And while we entertain great respect for that able court, we cannot follow its decisions upon a question that apparently was not very fully considered, and so far as appears was not properly before the court.

To the extent of requiring the county commissioners of Dodge county to act in the premises, a peremptory writ will be awarded
Judgment accordingly.

Derby v. Weyrich.

DERBY V. WEYRICH.

(8 Neb. 174.)

Fraudulent conveyance — exempt property.

Property exempt from execution is not susceptible of fraudulent alienation.*

CREDITOR'S bill. The opinion states the facts. The plaintiff had judgment below.

E. R. Dean, for plaintiff in error.

Whitmoyer, Gerrard & Post, for defendant in error, cited *Bowker v. Collins*, 4 Neb. 494; *State Bank v. Carson*, id. 498; *Charless v. Lambertson*, 1 Iowa, 439; *Christy v. Dyer*, 14 id. 438; *Elston v. Robinson*, 23 id. 208.

COBB, J. The defendant in error brought an action in the nature of a creditor's bill against the plaintiffs in error. In his petition he alleges that in March, 1877, Weyrich & Company, of which he is the sole member, recovered judgment against C. W. Derby in the county court of Butler county for \$231.76, with costs of suit and attorneys' fees. That on the 6th day of April following execution issued — was returned: "No property found." That afterward a transcript of said judgment was filed in the office of the clerk of the District Court of said county, and the case docketed in said office August 13, 1877. That on the 17th day of said month an execution was issued on said judgment out of said clerk's office to the sheriff of said county, and afterward also returned — "No property found." That the said C. W. Derby is now and has ever since the date of said judgment been insolvent. That said judgment remains wholly unsatisfied. That on the 9th day of April, 1877, the defendant, C. W. Derby, purchased from W. B. Rochon a certain eighty-acre tract of land situated in said county, and caused the deed of conveyance to be made in the name of Ida H. Derby, his wife and co-defendant, who now holds the apparent title to the same. That the said deed was made to the said Ida without consideration, but the consideration was wholly paid by

* See *Carhart v. Harshaw*, ante, p. 752.

the said C. W. Derby, and was so made to the said Ida H. for the purpose of wronging and defrauding the said petitioners, etc., with prayer that said real estate might be decreed to be subject to the said judgment, etc. The defendants answered, denying that the deed mentioned in the petition was made to the defendant, Ida H., without consideration or for the purpose of defrauding the said plaintiff, etc., and alleging "that the consideration paid by the said C. W. Derby for the land described, etc., consisted wholly and entirely of property that could not be sold on execution to pay the debts of the said C. W. Derby. That all of said property was exempt from seizure and sale for the satisfaction of the said C. W. Derby's debts, or any part thereof, and that the said lands described in the plaintiff's petition were purchased for the express purpose of making the same a homestead for the said C. W. Derby and his family, and that the same is all the land that the said C. W. Derby and Ida H. Derby, or either of them, owned or had at that time, or have since owned or now own."

To this answer the plaintiff put in a general demurrer, which was sustained by the court, and the defendants refusing to plead further their default was entered, and after an *ex parte* trial, judgment was entered for the plaintiff, in accordance with the prayer of his petition. From this judgment the defendants bring the cause to this court by petition in error.

By his demurrer the defendant in error admits that the consideration paid by C. W. Derby for the land consisted wholly and entirely of property that could not be sold on execution to pay the debts of the said C. W. Derby, and that all of said property was exempt from seizure and sale for the satisfaction of the said C. W. Derby's debts. This exempt property being traded by C. W. Derby to Rochon for the land, and the title to the land taken in the name of Ida H. Derby, leaves the situation of the parties in respect to the transaction about the same as though C. W. Derby had transferred the exempt property to Ida H. Derby without any consideration, he being at the time indebted to the defendant in error and insolvent. In such case would a court of equity follow the property into the hands of C. W. Derby's grantee and subject it to the payment of his debts, which it was not subject to while in his hands?

Story says: "The English doctrine upon this subject, after various discussions, has at length settled down in favor of the former

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proposition, namely, that in order to make a voluntary conveyance void as to creditors, either existing or subsequent, it is indispensable that it should transfer property which would be liable to be taken in execution for the payment of debts. The reasoning by which this doctrine is established is, in substance, that the statute of 13th Elizabeth did not intend to enlarge the remedies of creditors, or to subject any property to execution which was not already in law or equity subject to the rights of creditors. That a voluntary conveyance of property not so subject could not be injurious to the creditors, nor within the purview of the statute, because it would not withdraw any fund from their power which the law had not already withdrawn from it. And that would be a strange anomaly to declare that to be a fraud upon creditors which in no respect varied their rights or remedies. Hence it has been decided that a voluntary settlement of stocks, or of choses in action, or of copyhold, or of any other property not liable to execution, is good, whatever may be the state and condition of the party as to debts." Story's Equity, § 367. See English authorities there cited.

Bump, in his work on Fraudulent Conveyances, says: "Property which is exempt by a positive statute from liability for the owner's debts is not susceptible of a fraudulent alienation, and consequently is not within the statute. The creditors cannot be said to be creditors as to that particular property so as to make a transfer of it matter of concern to them. The debtor as to that property may be considered as without creditors, and he has the right to dispose of it as though he had no creditors. He may sell it and purchase another piece of property with the proceeds and have the latter conveyed to his wife." Bump on Fraud. Conv. 242, and see numerous cases there cited.

The right of the defendant in error to have the land sold and applied to the payment of his debt, if he have any, must be founded upon his right to the fund with which it was purchased. As he had no right to the fund, it having been placed beyond his reach by the law, he has no right to disturb the possession of the land in the hands of Ida H. Derby.

The above views rendering it necessary that the judgment of the District Court sustaining the demurrer be reversed, it is not deemed necessary to examine the other question raised and discussed in the brief of counsel.

Reversed and remanded.

POLO MANUFACTURING CO. v. PARR.

(3 Neb. 379.)

Negotiable instruments—when memorandum a part of note.

On the back of a promissory note the following memorandum was written at the time of the execution of the note: "This note to be paid in wheat at ninety-five cents per bushel. *Held*, that the memorandum was a part of the note.

ACTION on a promissory note. The opinion states the facts. The defendant had judgment.

J. B. Barnes, for plaintiff in error.

Vanatta & Son and *Ed. T. Healey*, for defendants in error.

MAXWELL, C. J. The plaintiff brought an action in the District Court of Dixon county against the defendants, upon the following obligation:

"\$142.50.

PONCA, Neb., July 17, 1875.

"For value received in one Polo harvester, No. 118, we, the subscribers, of the town of Ponca, county of Dixon, and State of Nebraska, promise to pay the Polo Manufacturing Co. or order \$142.50, in Elk Point, D. T., on the 1st day of January, 1876, with interest at the rate of ten per cent per annum until paid, and if paid when due, a deduction of ten per cent per annum. It is also stipulated that should suit be commenced to enforce the collection of this note, the holder thereof shall be allowed an attorney's fee of five per cent upon the amount due. And in consideration of credit given, I hereby waive all exemptions given by statute, and agree that execution may levy upon property so exempt. The express condition of the purchase and sale of the said Polo harvester is such that the ownership and right of property does not pass from Polo Manuf. Co. until this note and interest are paid in full. And the said Polo Manuf. Co. have full power to declare this note and interest due, and to take possession of said property at any time the Polo Manuf. Co. may deem itself insecure, even before the maturity of the note. For the purpose of obtaining credit, we certify that we own in our own names 320 homestead acres of land, in

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towns 30 and 31, range 5 east, county of Dixon, State of Nebraska, with 100 acres improved, worth at a fair valuation, \$1,200.00. It is not incumbered by mortgage or otherwise, except the amount of \$, and that the title is perfect in all respects. We own \$800.00 worth of personal property over all incumbrances, except the incumbrance on land, if any.

“Witness: E. H. JONES.

(Signed) “WM. + PARR.
his
mark
“HERMAN WENDT.”

On the back of the note were the following indorsements:

“This note to be paid in wheat at ninety-five cents per bushel.”

“For value received we guarantee the payment of the within note, and waive protest, demand, and notice of non-payment.

(Signed)

“LAIRD & KING.”

The bill of exceptions contains the following stipulation: “It is hereby stipulated and agreed that on the trial of this cause, and in the opening of the same to the jury and before the introduction of testimony, it was admitted by the counsel for plaintiff in said opening of said cause, that on the 29th day of December, 1875, the defendants delivered to Laird & King, at Elk Point, Dakota Territory, enough wheat at the rate of ninety-five cents per bushel to amount to the sum due on the note in question in this suit.

(Signed)

“J. B. BARNES,
“Attorney for plaintiff.”

On the trial of the cause a verdict was rendered for the defendants, upon which judgment was rendered dismissing the same. The cause is brought into this court by petition in error.

The errors assigned are: That the court erred in its instructions to the jury, etc. That the court erred in admitting the evidence of the defendants, etc. That the court erred in overruling the motion for a new trial, etc.

The wheat in payment of the note was delivered to Laird & King, and the only question to be determined is, their authority to receive it, the note at the time being in the possession of the plaintiff. That Laird & King were the authorized agents of the plaintiff to receive payment of the note in wheat is shown by a clear pre-

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ponderance of the testimony, notwithstanding the denial of the officers of the company.

Exceptions were taken by the plaintiff to all the instructions given by the court to the jury, but our attention is particularly called to the fourth instruction, which is as follows:

"In consideration of this subject you can take into consideration the fact that the note in question was indorsed as being payable in wheat at Elk Point, D. T., but silent as to whom payable; also, all statements made by plaintiffs in their depositions and letters written by them about the time of the payment of the wheat, with reference to the agency of these gentlemen, Messrs. Laird & King."

It is particularly urged that the memorandum on the back of the note, that it was payable in wheat, was no part of the contract, and should not have been considered.

In the case of *Hartley v. Wilkinson*, 4 Camp. 127, a note absolute on its face had this condition written on the back: "This note is given on condition that if any dispute should arise between Lady Wray and D. Hartley respecting the sale of the within-mentioned fir, then the note to be void." *Held*, a part of the note. Also, where there was indorsed on the back of the note that it was "to be taken for security for all balances as J. M. may happen to owe T. L. & Co., not extending further than the within-named £200, but this note to be in force for six months, and no money to be called for sooner in any case." *Leeds v. Lancashire*, 2 Campb. 205.

So where there was indorsed on the back of the note: "The within note is given for securing certain floating advances." *Chelmeley v. Darley*, 14 M. & W. 344. And when an indorsement was made that payment was not to be expected until a mill was sold. *Blake v. Coleman*, 22 Wis. 416; Dan. on Neg. Insts., § 151; 2 Par. on Notes and Bills, 542.

The rule results from the principle that the construction of the note is to be gathered from the whole of it, as well from the words on the back as those on the face. Therefore, a memorandum upon the back of a note, made by agreement of the parties before signing, will bind all the parties to it. The instruction, therefore, is not erroneous. From a careful examination of the entire record it is clear that there is no error of which the plaintiff can complain; and it is apparent that justice has been done in rendering judgment for the defendants. The judgment is therefore affirmed.

Judgment affirmed.

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The plaintiff's attorney makes application to file a motion for a reargument of the case upon certain enumerated grounds, none of which are sufficient to justify the court in granting a reargument. The case has been fully and carefully considered, and we see no reason for changing our decision. The application to file the motion must therefore be denied.

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See CRIMINAL LAW, 146; DAMAGES, 814.

ASSESSMENT.

Without notice or hearing.] *See* CONSTITUTIONAL LAW, 299.

ASSIGNEE.

Of lease.] *See* LANDLORD AND TENANT, 680.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

By partners — when general] L. and B., partners, executed a voluntary assignment for the benefit of creditors, in which their wives joined, transferring all the property, real and personal, of L. and B., except such as was exempt, and signed by them as individuals. In the caption, L. and B. were described as copartners, doing business under the firm name of L. & Co., parties of the first part, and in the body of the instrument the direction was to pay the debts due from L. and B., "partners as aforesaid." *Held*, that the assignment conveyed the separate property of L. and B., as well as the partnership effects. *Williams v. Hadley (Kana.)*, 430.

ATTACHMENT.

Money in custody of court.] Money deposited with the clerk of a court, in pursuance of law, in place of an undertaking on appeal, is liable to attachment by a third person against the depositor. *Dunlop v. Patterson Fire Ins. Co. (N. Y.)*, 288.

Of debt due partnership, at suit of creditor of individual partner.] *See* PARTNERSHIP, 426.

Not upon dower.] *See* DOWER, 412.

ATTORNEYS AT LAW.

Right to restrict to white male citizens.] *See* CONSTITUTIONAL LAW, 451.

ATTORNEY AND CLIENT.

Right to release client's judgment.] An attorney at law has no right to release his client's judgment, without his knowledge or consent. *Kirk's Appeal* (Penn. St.), 857.

ANTE-NUPTIAL CONVEYANCE.

Action to set aside.] See MARRIAGE, 441.

AUCTIONEER.

See STATUTE, 234.

BAGGAGE.

Samples of merchandise.] See CARRIER, 667.

See CARRIER, 271.

BAILMENT.

Carrier of mails — liability for money stolen from mails.] One who contracts to carry the mails for the government is neither a common carrier nor a private carrier, and is not liable to the owner for money stolen from the mails by his subordinates; and his promissory note given therefor is without consideration and creates no liability as between the parties. *Poster v. Metts* (Miss.), 504.

BANK.

Lien upon deposit.] A bank has no lien upon a customer's deposit for his indebtedness to the bank not yet due. *Jordan v. National Shoe and Leather Bank* (N. Y.), 819.

Evidence of charter.] See EVIDENCE, 378.

BANKRUPTCY.

Dower — not barred by.] A bankrupt's wife is not barred of dower by the sale of her husband's lands by the assignee in bankruptcy. *Lassar v. Porter* (Penn. St.), 880.

BAR.

See CRIMINAL LAW, 674.

BILL OF EXCHANGE.

What constitutes.] See NEGOTIABLE INSTRUMENTS, 763.

BOND.

When void for want of condition.] A bond recited a contract between the principal obligor and the obligee, and then, without any condition, concluded, "then this obligation shall be void," etc. *Held*, to create no liability on the part of the obligors. *Fitzgerald v. Staples* (Ill.), 551.

BOUNDARY.

Alteration of.] See CRIMINAL LAW, 142.

BURGLARY.

Breaking out.] See CRIMINAL LAW, 69.

See CRIMINAL LAW, 126.

CARRIER.

1. **Delivery of goods to wrong person.]** Plaintiff, at Columbus, Georgia, delivered his household goods, marked "R. Adams," to defendant, a common carrier, for carriage. He accompanied them as far as New Orleans. There he directed defendant's agent to forward them to Bremond, Texas. By mistake the agent shipped them to Brenham. There, on the authority of a letter written from Burton, signed "R. Adams," they were forwarded to Burton, and there delivered to a man calling himself Robert Adams, a single man and day laborer, who had no bill of lading or receipt for them, and was not the plaintiff. *Held*, that the defendant was liable for the goods as a common carrier. *It seems*, the defendant would be liable therefor as a warehouseman, for gross negligence. *Houston, etc., Ry. Co. v. Adams* (Tex.), 116.
2. **Action by one against another connecting, for failure to deliver goods to carry.]** In the absence of any contract between the owners of two connecting railroads, one cannot maintain an action against the other for failing to ship cotton over the plaintiff's road which the other road had transported to the point of connection; and the fact that the owners of the cotton had contracted with the plaintiff to ship the cotton over its road does not give it a right of action against the defendant. *Wilmington, etc., Railroad Company v. Greenville, etc., Railroad Company* (S. C.), 28.
3. **Contract for price of carriage — detention of goods for increased price.]** A common carrier received a package for transportation, agreeing to carry it for a stipulated sum prepaid, without inquiry into its value, or notice of a limited liability on account of value, and without misrepresentation, deceit or artifice on the part of the shipper. Discovering that the package was of greater value than he had supposed, he refused to deliver it to the consignee without additional compensation, which the consignee paid. *Held*, that the latter might maintain an action to recover it back. *Baldwin v. Liverpool and Great Western Steamship Co.* (N. Y.), 277.
4. **When bound to carry goods to destination — when liability terminates.]** The plaintiff delivered to the defendant at New York goods addressed to the consignee at Bloomington, Illinois. The defendant gave a bill of lading, acknowledging the receipt of the goods thus addressed, but specifying that they were to be forwarded to "Chicago depot only." It was proved that there was no other agreement, and that the plaintiff was in the habit of shipping goods in like manner and receiving similar bills of lading. *Held*, that the presumption of an agreement to deliver the goods at Bloomington, raised by the acceptance of the goods so marked, was overcome by the express contract in the bill of lading. *Merchants' Dispatch and Transportation Company v. Moore* (Ill.), 541.

CARRIER — *Continued.*

6. —] A carrier transported goods to their destination, where they arrived late at night. On the arrival he placed them in his warehouse, a secure place of storage, and the next morning they were destroyed by fire without his fault. *Held*, that he was not responsible, although he gave no notice to the consignee of the arrival. *Id.*

6. Of live animals — Liability of.] The common-law liability of a common carrier for the delivery of live animals is the same as that for the delivery of inanimate things, and he is not liable for injuries caused by the peculiar character and propensities of the animals: *Bamberg v. South Carolina Railroad Co.* (S. C.), 13.

OF PASSENGERS.

7. Liability for baggage — ownership — statute of another State — paraphernalia.] Baggage, consisting of articles which had been purchased by the plaintiff and in use by the plaintiff, his wife and their child, was delivered to the defendant, a Pennsylvania corporation, at Scranton, Penn., for carriage to the city of New York. The plaintiff did not accompany it, but took another train, while the wife and child went by the train with the baggage. The baggage arrived at New York, and was there lost by negligence of the defendant. *Held*, (1) that the contract of carriage was not affected by a Pennsylvania statute limiting the carrier's liability; (2) that it was not necessary that the plaintiff should have been on the same train; (3) that in the absence of proof of a gift to the wife, the husband could recover for the wife's paraphernalia; (4) that defendant was at least liable as a warehouseman. *Curtis v. Delaware, Lackawanna and Western Railroad Co.* (N. Y.), 271.

8. Baggage — samples of merchandise.] The plaintiff's travelling salesman delivered to the defendant railroad company at Worcester a trunk belonging to the plaintiffs, and filled with samples of jewelry belonging to them, worth \$10,000, for transportation as his baggage to Hartford, for which place he purchased a ticket for himself. He did not inform defendant of the character or value of the contents of the trunk. The trunk was of ordinary size and shape, but weighed 135 pounds, and was visibly bound on the outside with heavy iron braces, clamps and hinges. On the arrival of the train at Hartford the trunk was not delivered to the agent, but a bag had been fraudulently substituted by a change of checks, and the trunk was carried to New York, and there delivered to one who presented the check for it, and was afterward found there broken open and robbed of its contents. *Held*, (1) that the defendant was not liable to plaintiffs in contract, for the only contract was to carry the personal baggage of the agent, and (2) was not liable in tort in the absence of gross negligence. *Alling v. Boston & Albany Railroad Company* (Mass.), 667.

9. Expulsion of drunken passenger from train — duty in regard to.] It is not only the right of a conductor to expel from a train a drunken, unruly, boisterous passenger, but when such a person endangers by his acts the lives of people, it is the duty of such conductor to remove such passenger.

CARRIER — *Continued.*

in order to protect others from violence and danger. But this right must be reasonably exercised, and not so as to inflict wanton or unnecessary injury upon the offending passenger, nor so as to needlessly place him in circumstances of unusual peril. If having exercised reasonable prudence, considering the time, place and circumstances, as also the condition of the drunken man himself, the conductor expels such passenger, who is afterward run over and killed by another train not in fault, the expulsion itself is not such proximate cause of the death as will make the company liable. *Railway Co. v. Valleley* (Ohio St.), 601.

10. **Liability for injury to passenger on freight train.]** A passenger on a freight train of defendant was killed by an accident while so riding. The defendant's conductors were forbidden to allow passengers on freight trains, and the deceased knew that regulation. He was on the train with the conductor's consent, but it did not appear that he paid fare. *Held*, that it could not be presumed that the defendant had contracted to carry the deceased as a passenger, and no action would lie for his death. *Houston and Texas Central Railway Co. v. Moore* (Tex.), 98.

Of mails, liability of, for stolen moneys.] See BAILMENT, 504.

CHATTEL MORTGAGE.

Lien of, as against agister.] See AGISTER, 425.

CHECK.

See NEGOTIABLE INSTRUMENT, 712.

CHURCH.

Sale of pews.] See DEED, 298.

CIVIL DAMAGE ACT.

Injury to means of support — plaintiff's minor son.] In an action under the Civil Damage Act, for injury to the plaintiff's means of support, by the intoxication of the plaintiff's minor son by liquors sold by the defendant, whereby the son was incapacitated for the services he had been accustomed to render his father, and the father had been subjected to expense for medical attendance, etc.; *held*, that there could be no recovery without proof that the services were necessary to the father's support, or that the expenses had so diminished his means as to render them inadequate for his support. *Volans v. Owen* (N. Y.), 887.

Liability of lessors.] See CONSTITUTIONAL LAW, 822.

CONDITION.

See DEED, 298.

CONSTITUTIONAL LAW.

1. **Civil Damage Act—liability of lessors.]** A statute enacting that the lessor of premises, with knowledge that they are to be used for the sale of in-

CONSTITUTIONAL LAW — *Continued.*

toxicating liquors, is liable for damage caused by the act of one intoxicated by liquors sold there, is constitutional. *Bertholf v. O'Reilly* (N. Y.), 323.

2. **Cruel and unusual punishment.]** A husband having beaten his wife in great excess, without excuse or provocation, and to such a degree of cruelty as to indicate malice toward her, *held*, that a sentence of imprisonment for two years in the county jail, on his conviction for the assault and battery, was not in violation of the constitutional provision against cruel and unusual punishments. *State v. Pettie* (N. C.), 88.
3. **Extradition — inquiry into facts alleged in requisition.]** A State statute, prohibiting the surrender of a citizen or resident of that State as an alleged fugitive from justice, upon the requisition of the governor of another State, when it shall be made to appear that such alleged fugitive was in the former State at the time of the alleged commission of the crime, and providing for such an inquiry, is constitutional. *Hartman v. Aveline* (Ind.), 217.
4. **Double damages for killing stock.]** A statute allowing double damages to the owner of stock killed on a railroad through the neglect of the company to maintain the required fences is penal in its nature, and constitutional. *Barnett v. Atlantic and Pacific Railroad Co.* (Mo.), 773.
5. **Exclusive license to ferry — what is.]** A legislature may empower a city to grant an exclusive license to ferry across a navigable river, and the conferring of power to grant or refuse such license authorizes the granting of an exclusive license. *Burlington and Henderson County Ferry Co. v. Davis* (Iowa), 390.
6. **Restriction of right to practice law to white male citizens.]** A statute limiting the right of admission as attorney at law to white male citizens is not in conflict with the Federal Constitution. *Matter of Taylor* (Md.), 451.
7. **Penalty for not stopping railroad trains a specified time at stations.]** A statute, imposing a penalty on railway conductors for failing to cause their trains to stop five minutes at every way station, is constitutional. *Davidson v. State* (Tex. Ct. App.), 166.
8. **Statute regulating issue and sale of tickets by passenger carriers.]** A State statute provided that no passenger carrier should issue or sell any ticket subject to any condition limiting his liability, unless the same was printed thereon in type of a specified size; that every ticket seller should be furnished with a certificate of authority, which he should keep publicly posted; that every such carrier should provide for the redemption of tickets, or parts of tickets sold but not used, at the purchase-price or a proportionate part thereof; and that no such purchaser of tickets should otherwise sell them except to *bona fide* travellers; and made disobedience a misdemeanor punishable by *certain* fines. *Held*, constitutional. *Fry v. State* (Ind.), 238.

CONSTITUTIONAL LAW — *Continued.*

9. **Miscegenation.]** A statute making it a felony for a white person to marry a negro or a person of mixed blood is not in conflict with the Federal Constitution. *Frasher v. State* (Tex. Ct. App.), 131.
10. **Statutory construction — double license for noisome trade — when can be exacted.]** A statute gave cities and villages the power to direct the location and regulate the management and construction of pork-packing houses within their limits and one mile beyond. The plaintiff carried on a packing-house in the town of Lake, within one mile of the city of Chicago, and licensed by the town. *Held*, (1) that the power to regulate authorized the requirement of a license; and (2) that the city of Chicago might legally require the plaintiff to be licensed by it, although he was previously licensed by the town. *Chicago Packing and Provision Co. v. City of Chicago* (Ill.), 545.
11. **Assessment for local improvement — notice — hearing.]** A law imposing an assessment for a local improvement, without providing for notice to the owners of property to be assessed, and an opportunity for them to be heard, is unconstitutional and void, and an assessment thereunder creates no cloud upon title. *Stuart v. Palmer* (N. Y.), 289.
12. **Taxation — of premiums received by insurance companies.]** A State tax upon "the entire amount of premiums received by insurance companies," although it covers premiums drawn from sources outside the State, is not in conflict with the Federal Constitution. *Insurance Company of North America v. Commonwealth* (Penn. St.), 352.
13. **Uniformity of taxation — tax for education.]** A statute provided that persons residing outside of a city or town, and electing to be transferred to such city or town for educational purposes, or who should send their children to a school in such city or town, should be liable to taxation on their property in such city or town as if they resided therein. *Held*, constitutional as to persons so sending their children to school, without making such election to be transferred. *Kent v. Town of Kentland* (Ind.), 182.
14. **Taxation — farming lands within a city.]** Farming lands within a city are subject to municipal taxation, although they are not benefited by the objects for which such taxation is levied. *Cary v. City of Pekin* (Ill.), 543.
15. **Tax on National bank stock.]** A statute empowering the authorities of a town to impose the same taxes, for municipal purposes, upon non-residents pursuing their ordinary avocations within the corporate limits as upon the inhabitants, with a *proviso* that non-residents so taxed shall have the right to vote at municipal elections, is not abrogated by a change in the State Constitution which deprives the non-resident tax payer of his vote, and authorizes a tax upon the shares in a National bank, located in the town, and held by one who conducts his ordinary business therein but whose residence is in the county, outside the corporate limits. *Moore v. Mayor and Commissioners of Fayetteville* (N. C.), 75.
16. **Tax on dogs.]** Dogs are not "property" within the constitutional provisions for taxation: but a statute exempting one dog to each family, and

CONSTITUTIONAL LAW — *Continued.*

taxing all others at a fixed rate, under a penalty for non-payment, is valid as a police regulation. *Ex parte Cooper* (Tex. Ct. App.), 152.

- 17. Delegation of power to make local improvements and assess the expense.]** A constitutional provision that "the legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments, or by taxation of property benefited," does not prohibit the legislature from conferring the power to make such improvements in like manner upon other municipal corporations. *State ex rel. Abbott v. Dodge County* (Neb.), 819.

CONSTRUCTIVE FRAUDS.

See FRAUD, 577.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 620.

CONTRACT.

- 1. Construction — "legal heirs" — widow.]** A widow is not a "legal heir" of her husband, within the meaning of a life insurance policy payable to the "legal heirs" of the insured husband, although by the statute the widow has a certain interest in the intestate husband's personalty. *Gauch v. St. Louis M. L. Ins. Co.* (Ill.), 554.
- 2. Law of place — delivery to common carrier — acceptance.]** Plaintiff, a resident of Wisconsin, sued defendant, a resident of Iowa, on account for intoxicating liquors sold and delivered pursuant to an oral order given in Iowa. Defendant answered that the sale was in violation of an Iowa statute. Plaintiff replied that the sale was also void under the Iowa statute of frauds, but that plaintiff had avoided the effect of both statutes by delivering the goods to a carrier in Wisconsin for transportation, in accordance with an agreement at the time of the sale. On demurrer, *held* that the answer was good and the reply was bad. *Keiwert v. Meyer* (Ind.), 206.
- 3. Rescission for fraud — effect of delay.]** Mere delay in rescinding a contract on account of fraud is immaterial unless meanwhile innocent third parties have acquired rights, or unless the wrong-doer is injuriously affected by the delay. *Wicks v. Smith* (Kans.), 433.
- 4. By school district — ultra vires.]** Under a statute authorizing school district boards to provide "necessary appendages" for school-houses during the time that schools are taught, there is no authority to purchase a stereoscope and stereoscopic views. *School District v. Perkins* (Kans.), 447.
- 5. Subscription to joint stock — parol evidence to show unperformed secret condition.]** A subscription to joint stock is not only an undertaking with the company but with all other subscribers. So where one subscribed to the building of a railroad according to a specified survey, the amount to be paid only when the subscriptions reached an amount specified, he cannot be permitted to show that he was induced to subscribe by the promises

CONTRACT — *Continued.*

of the company's agents that the road should be constructed not according to the survey, but past his house, etc., and that his subscription was not to be binding unless the road was so constructed. *Miller v. Hanover Junction and Susquehanna Railroad Co.* (Penn. St.), 349.

6. **Validity** — note for profits of an illegal business.] A note given on the completion and settlement of an illegal business, by one of the partners therein to the other, for profits thereof, is valid and enforceable. *De Leon v. Trevino* (Tex.), 101.

Of Carriage.] *See* CARRIER, 277.

Church subscription.] *See* SUNDAY, 147; INFANCY, 224.

Law of place.] *See* STATUTE OF FRAUDS, 199.

CONTRACTOR.

See NEGLIGENCE, 645.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 721.

CORPORATION.

1. **Meeting of directors** — when notice presumed.] A quorum of the directors of a corporation having attended a special meeting, it will be presumed *prima facie* that all the directors were duly notified to attend. *Chouteau Insurance Co. v. Holmes' Admr.* (Mo.), 807.

2. **Rights of, as to transfers of its stock.**] A corporation can avail itself of a provision in its by-laws that transfers of its stock shall not be valid unless approved by its board of directors, only for the purpose of protecting itself against irresponsible stockholders, and not to defeat the rights of third persons. *Farmers and Mechanics' Bank of Lincoln v. Wasson* (Iowa), 398.

3. —.] In the absence of contract or provisions of the charter or by-laws, a corporation has no implied lien upon the shares of a stockholder indebted to it, to secure such indebtedness. *Id.*

4. —.] The president of a bank, who was a surety upon the note of an insolvent stockholder to a third person, took an assignment of his stock for indemnity. The stockholder was also indebted to the bank. *Held*, that in the absence of fraud or concealment, the president had the right to such security as between himself and the bank, and the bank had no equitable right thereto. *Id.*

See REMOVAL OF CAUSE, 260.

COVENANT.

Not to make will to prejudice of covenantor's heirs.] A sealed agreement, for a valuable consideration, not to make a will to the prejudice of the rights of the covenantor's heirs in his estate, is valid. *Taylor v. Mitchell* (Penn. St.), 383.

See DEED, 562.

CRIMINAL LAW.

1. **Adultery — subsequent marriage.]** The criminal offense of adultery is not excused by the absence of a guilty intent, unless a guilty knowledge is part of the statutory definition, nor is it excused by the subsequent inter-marriage of the parties. *Fox v. State* (Tex. Ct. App.), 144.
2. **Affray — trespass on public road.]** The public have only an easement in a highway to pass and repass along the same, and when one stops in the road and uses loud and obscene language, he becomes a trespasser, and the owner of the land has the right to abate the nuisance which he is creating; and in case the trespasser is armed with a pistol and acting in a belligerent manner, the principle of *molliter manus* does not apply. *State v. Davis* (N. C.), 86.
3. **Assault with intent to murder — mutual combat by agreement.]** In case of a mutual combat waged, where death does not ensue, in order to reduce the offense from assault with intent to murder to aggravated or simple assault, it must appear that the combat was waged upon equal terms, and that no undue advantage was sought or taken by the accused. *King v. State* (Tex. Ct. App.), 160.
4. **Burglary — breaking out.]** One who secretes himself in a dwelling-house at night, with intent to commit a felony therein, and being discovered, escapes by unlocking or opening a door, is not guilty of burglary. *Addin-son v. The State* (Baxt.), 69.
5. **— decoying into commission of.]** A banker, suspecting defendant of an intention of robbing his bank, employed detectives to act as decoys and induce him to enter the bank, with intent to rob it. *Held*, that the defendant could not be convicted of burglary therefor, the consent of the detectives being the consent of their employer. *Speiden v. State* (Tex. Ct. App.), 126.
6. **Disturbing religious worship.]** Cracking and eating nuts during a religious service may be a disturbance of religious worship. *Hunt v. State* (Tex. Ct. App.), 126.
7. **Forgery — municipal certificate of indebtedness ultra vires.]** Under a statute constituting it forgery fraudulently and falsely to make any instrument purporting to be the act of another, by which any pecuniary demand shall purport to be created, etc., the fraudulently making of a false municipal certificate of indebtedness is forgery, although the municipality has no power to issue such certificates. *State v. Eades* (Mo.), 780.
8. **Homicide — accidental killing of third person in lawful self-defense.]** One who in lawful self-defense against another accidentally and unintentionally kills a third person is guilty of no crime. *Plummer v. State* (Tex. Ct. App.), 165.
9. **Larceny — "gelding."] A ridgling (i. e., a half-castrated horse) is not a "gelding," within a statute providing against the theft of "any horse, gelding, mare, colt, ass, or mule," and an indictment charging the theft of a "gelding" is not supported by proof that the animal was a ridgling.**

CRIMINAL LAW — *Continued.*

- ... but had the appearance of, and was generally believed to be, a gelding. *Brisco v. State* (Tex. Ct. App.), 162.
10. ———severance and asportation.] The simultaneous removal and carrying away of rails from a fence, with larcenous intent, and without the owner's consent, is theft. *Harberger v. State* (Tex. Ct. App.), 157.
11. ———conversion of estrays, when larceny.] When one converts an estray to his own use, there must have been a felonious intent to steal it at the moment of taking in order to constitute larceny. *Starck v. State* (Ind.), 214.
12. ———coffin — who has property in.] In an indictment for larceny of a coffin containing the remains of a human being, the coffin is properly charged to be the property of the person who furnished it and buried the deceased. *State v. Dapke* (Mo.), 785.
13. Obscene pictures — “naked.”] An indictment for printing and publishing obscene pictures of naked girls is not sustained by proof of printing and publishing obscene pictures of girls naked only above the waist. *Commonwealth v. Dejardin* (Mass.), 652.
14. Seduction — force.] An indictment for seduction is not supported by proof that the defendant accomplished his purpose by force, and he is entitled to such an instruction if there is any evidence of force. *State v. Lewis* (Iowa), 407.
15. ———under promise of marriage — whether promise need be valid.] A statute made it felony for any person, under promise of marriage, to have illicit carnal intercourse with a female infant of good repute for chastity. *Held*, that the promise need not be a valid one, in fact, if the infant understood it to be valid; and the indictment need not allege that the defendant was unmarried at the time. *Callahan v. State* (Ind.), 211.
16. Selling intoxicating liquors supposing them not to be intoxicating.] A person indicted for selling intoxicating liquors, in violation of statute, may, on the trial, show that at the time he bought the article alleged in the indictment to be intoxicating liquor, it was represented to him to be free from alcoholic properties — that he bought it with the understanding and believing that it was not intoxicating liquor, and sold it with such understanding and belief. *Farrell v. The State* (Ohio St.), 614.
17. Indictment — assault with pistol.] An indictment charging an assault with a pistol, alleging that it was a deadly weapon, is not bad for not charging that it was loaded, nor presented within range. *Burton v. State* (Tex. Ct. App.), 146.
18. ———for rape — allegation of sex.] An indictment charging an attempt to commit a rape upon “Theresa Gaudaloupe,” and referring to that person as “her” is good without alleging that person to be a woman. *Battle v. State* (Tex. Ct. App.), 169.
19. Polygamy.] An indictment for polygamy contained the usual allegations of the second marriage during the life-time of the former wife, but

CRIMINAL LAW — *Continued.*

the proof showed that the first wife was divorced from the defendant at the time of the second marriage. The statute pronounced a second marriage under such circumstances polygamy. But as the crime may be committed in divers ways, it was *held* that the indictment must specify the manner of commission, and this indictment was therefore bad. Whether without the statute the offense would have been polygamy, *query*. *Commonwealth v. Richardson* (Mass.), 647.

20. Evidence of character — weight of.] In a criminal case it is error to instruct the jury that evidence of good character is of but slight weight and entitled to but little consideration, when the proof is clear and direct. The jury are the sole judges of the weight of such evidence. *State v. Northrup* (Iowa), 408.
21. — calling on prisoner to "make tracks," in court.] On an accusation of murder, it being claimed that certain foot-prints were those of the prisoner, the prosecuting attorney brought a pan of mud into court and placed it in front of the jury, and having proved that the mud in the pan was about as soft as that where the tracks were found, called on the prisoner to put his foot in the mud in the pan. On objection, the court instructed the prisoner that it was optional with him whether he would comply. The prisoner refused, and the court instructed the jury that his refusal was not to be taken against him. The prisoner being convicted, *held*, that he was entitled to a new trial. *Stokes v. State* (Bart.), 72.
22. — seduction — resemblance to prisoner of child alleged to be born of the intercourse.] On the trial of an indictment for seduction, a child, alleged to have been born of the alleged intercourse, cannot be exhibited to the jury as corroborative evidence for the prosecution on account of its resemblance to the defendant. *State v. Danforth* (Iowa), 387.
23. Criterion of value.] In distinguishing between grand and petit larceny, the criterion of value is the price which the subject of the larceny would bring in open market. *Id.*
24. Trial — right to read books to jury.] On a trial for felony, the prisoner's counsel, in his argument to the jury, proposed to read to them a statement of facts on an appeal in the same case, and the decision of the appellate court holding the evidence insufficient to convict, with a view to argue that the present evidence was also insufficient. The court refused to allow the reading. *Held* no error. *Dempsey v. State* (Tex. Ct. App.), 148.
25. Jury — experiments by, out of court, in regard to foot-prints.] In his argument to the jury on the trial of a felony, the defendant's counsel said in regard to a question of foot-prints, that the jury might try for themselves whether such worn-out boots as the witnesses for the prosecution described would make such tracks as they described. Some of the jury, without leave, made the experiment out of court. *Held*, such error as invalidated a conviction. *State v. Sanders* (Mo.), 782.

CRIMINAL LAW — *Continued.*

26. — use of intoxicating liquors by jury.] A verdict in a criminal case is not vitiated by the fact that some members of the jury drank intoxicating liquors during the trial and before the submission, unless it is shown that the defendant was thereby prejudiced. *State v. Bruce* (Iowa), 408.
27. Discharge of jury before verdict.] Where a jury, in a capital case, retired at 12 o'clock on Saturday night for deliberation, and were discharged at 6 o'clock the next evening, before verdict, because "it appeared they could not agree," *held*, that the prisoner was entitled to be discharged, although the term expired on Saturday. *State v. McGimsey* (N. C.), 90.
28. Bar — indictment covering part of former period.] An acquittal on a complaint for keeping a tenement for the illegal keeping and illegal sale of intoxicating liquors, from January 1 to May 28, is a bar to a complaint for the like offense from January 1 to August 20 of the same year, as the same evidence, which would have warranted a conviction on the first, would warrant a conviction on the second complaint. *Commonwealth v. Robinson* (Mass.), 674.
29. Twice in jeopardy.] On a trial for aggravated assault the defendant pleaded a former conviction before a justice of the peace. It appeared that the justice acted without affidavit or warrant, that no witnesses were examined, and that defendant pleaded guilty of simple assault. *Held* no bar. *Warriner v. State* (Tex. Ct. App.), 124.
30. Jurisdiction — alteration of boundary.] Where a boundary stream gradually alters its channel the boundary follows the channel; but where it changes violently and visibly, the boundary remains in the abandoned channel. *Collins v. State* (Tex. Ct. App.), 142.

DAMAGES.

1. Exemplary in action of assault.] In an action of assault and battery exemplary damages are not proper. *Boyer v. Barr* (Neb.), 814.
2. Measure of, as against trespasser.] Timber was cut from lands of B. by trespassers, who, by their labor, converted it into cord-wood and railroad ties, thus increasing its value three-fold. It was then sold to an innocent purchaser, who was sued by B. for the value of the wood and ties. Whatever might be the rule of damages as against innocent purchasers, B. cannot recover the value of the timber as enhanced by the labor of the wrong-doers, after it was severed from the realty. *Railway Company v. Hutchins* (Ohio St.), 629.
3. When liquidated.] V. & M. agreed to consign and ship to W. & Co. 500 bales of cotton, to be sold by them as cotton factors, on commission, and to pay as liquidated damages \$2 per bale for every bale of cotton less than 500 bales which they might fail to consign and ship to them as stipulated. *Held*, that the \$2 per bale was liquidated damages. *Williams v. Vance* (S. C.), 26.

DAMAGES — *Continued.*

Double, for killing stock.] See CONSTITUTIONAL LAW, 778.

Injury to means of support.] See CIVIL DAMAGE ACT, 237.

See CONSTITUTIONAL LAW, 828.

DEED.

1. **Assumption of mortgage — estoppel — eviction.]** One who takes a deed, assuming to pay a purchase-money mortgage existing on the granted premises as part of the consideration, cannot dispute the validity or consideration of the mortgage ; and cannot set up failure of title until actual eviction or surrender to a paramount title. *Parkinson v. Sherman* (N. Y.), 268.
2. **Condition — free church — what is a sale of pews.]** A deed of land “ for church purposes,” contained a condition that if the seats of any church thereon should be “ rented or sold,” the land should revert. The land, with the church erected thereon, was sold under judicial proceedings to pay debts of the church. *Held*, not a breach of the condition. *Woodworth v. Payne* (N. Y.), 298.
3. **Covenant of warranty — what constitutes eviction.]** The mere existence of a paramount hostile title does not constitute a breach of the covenant of warranty. *Scott v. Kirkendall* (Ill.), 562.
4. **Of lunatic — when valid.]** A deed executed by a lunatic is voidable only and not void ; and equity will not interfere to set aside such deed, where the grantee cannot be put *in statu quo*, or where the benefit received by the grantor is actual, and of a durable character ; therefore, in an action by heirs to recover land upon the ground of incapacity of their ancestor to make a deed, it appearing that the purchaser paid full value, without advantage taken, and without notice of such incapacity, that the deed was attested by a brother and two sons of the grantor, and that the purchase-money was used for the benefit of himself and family, and that the purchaser made large improvements without objection ; *held*, that they were not entitled to recover. *Riggan v. Green* (N. C.), 77.
5. **Reservation — exception.]** A deed to a railroad company contained this clause : “ Reserving to myself the right of passing and repassing and repairing my aqueduct logs forever, through a culvert six feet wide, and rising in height to the superstructure of the railroad, to be built and kept in repair by said company.” *Held*, to confer on the grantor a new right not previously vested in him, operative as a reservation and not as an exception, and vesting only an estate for life. *Ashcroft v. Eastern Railroad Company* (Mass.), 672.
6. **Registry — mistake in — effect of index.]** An index of the record of conveyances, by law required to be kept by the public recorder, but in which he is not required to state the amount of the consideration of instruments recorded, is not notice to a purchaser for a valuable consideration of such amount, although it state it. The same is true of an entry book. So where a mortgage is entered and indexed, correctly stating the amount, but in the record the amount is stated less, a subsequent purchaser for a

DEED — *Continued.*

valuable consideration, not knowing of the former mortgage, is bound only by the record, although he knew of the statement in the index. *Gilchrist v. Gough* (Ind.), 250.

7. Purchaser — who is.] A creditor who takes a mortgage in consideration of the extension of the time of payment of a pre-existing debt is a purchaser for a valuable consideration. *Id.*

DELEGATION.

Of legislative powers.] *See* MUNICIPAL CORPORATIONS, 776.

Of power to make local improvements.] *See* CONSTITUTIONAL LAW, 812.

DEMAND.

Of rent.] *See* LANDLORD AND TENANT, 229.

DEVIATION.

See INSURANCE, 654.

DEVISE.

See WILL, 802.

DIRECTOR.

See CORPORATION, 807.

DISTRESS FOR RENT.

Goods held by tenant for sale on commission.] Goods held by an agent for sale on commission are not liable to distress for rent due from the agent. *Howe Sewing Machine Company v. Sloan* (Penn. St.), 276.

DIVORCE.

See MARRIAGE, 84.

DOGS.

Taxation of.] *See* CONSTITUTIONAL LAW, 152.

DOWER.

When not liable to attachment.] An unassigned dower interest is not liable to attachment, although by statute it is a fee simple instead of a life estate. *Rausch v. Moore* (Iowa), 412.

Not barred by bankruptcy.] *See* BANKRUPTCY, 380.

DUEL.

See CRIMINAL LAW, 100.

ESTOPPEL.

See DEED, 268.

ESTRAYS.

Larceny of.] *See* CRIMINAL LAW, 214.

EVIDENCE.

1. Bank charter — judicial notice.] A bank is a private corporation, and its charter a private act, to be pleaded and proved like all other private acts, and the court will not take judicial notice of it without such proof. *First National Bank of Clarion v. Gruber* (Penn. St.), 378.

2. Of character — weight of, in criminal cases.] In a criminal case it is error to instruct the jury that evidence of good character is of but slight weight and entitled to but little consideration, when the proof is clear and direct. The jury are the sole judges of the weight of such evidence. *State v. Northrup* (Iowa), 408.

3. Parol — to show whether acceptance of bill is individual or official.] A bill was drawn by a corporation, addressed to its treasurer as an individual and accepted by him with the addition of "treasurer," etc. *Held*, that parol evidence was admissible to show that his acceptance was designed only in his official capacity. *Laflin and Rand Powder Company v. Sinsheimer* (Md.), 472.

4. — of lost will.] If a testator dies leaving an unrevoked will, which cannot be found after his death, parol evidence is competent to prove its contents. *Foster's Appeal* (Penn. St.), 840.

5. — as to lease and fixtures.] In a written lease, silent as to fixtures, it was provided that the lessee should make all necessary "improvements and repairs." For an independent consideration, the lessor agreed that certain fixtures should remain for the lessee's use. An outgoing tenant removed them, and the lessor promised to replace them, but failing to do so, the lessee replaced them at her own expense, and the lessor promised to make it right. *Held*, that parol evidence of the agreement about the fixtures was competent, and the lessee was entitled to recover the sum so expended. *Lewis v. Seabury* (N. Y.), 811.

6. Marriage — presumption of — when overcome.] The presumption of a marriage between A. and B., founded simply upon habit and repute, is overcome by proof of a subsequent actual marriage between A. and C. during the life-time of B. *Jones v. Jones* (Md.), 466.

7. Seduction — resemblance to prisoner of child alleged to be born of the intercourse.] On the trial of an indictment for seduction, a child, alleged to have been born of the alleged intercourse, cannot be exhibited to the jury as corroborative evidence for the prosecution on account of its resemblance to the defendant. *State v. Danforth* (Iowa), 887.

Parol, in construing will.] See WILL, 757.

— to explain ambiguity in will.] See WILL, 717.

— to show unperformed secret condition for stock subscription.] See CONTRACT, 349.

Of threats.] See TRESPASS, 558.

Of sense in which libellous words were used.] See SLANDER AND LIBEL, 481.

Foot prints.] See CRIMINAL LAW, 72.

INDEX.

EVICTION.

See DEED, 268.

EXCEPTION.

See DEED, 672.

EXECUTION.

See EXEMPTION, 788.

EXEMPTION.

1. **From execution — farming tools to one not a farmer.]** A statute, without naming any classes of persons entitled to exemption of property from execution, exempted “other farming utensils, including tackle for teams not exceeding \$50 in value.” A judgment debtor, not a farmer, nor engaged in any business requiring the use of a mowing machine, owned one of less than \$50 value. It did not appear that he owned any tackle for teams. *Held*, that the mowing machine was exempt. *Humphrey v. Taylor* (Wis.), 788.
2. **Voluntary conveyance of exempt property.]** The owner of property exempt from execution may confer a clear and valid title to it by sale or gift, without regard to his motives, and although by a subsequent change in his circumstances he should become unable himself to hold it as exempt if he had retained the title. *Carhart v. Harshaw* (Wis.), 702.

EXTRADITION.

See CONSTITUTIONAL LAW, 217.

FERRY.

Exclusive license to, what is.] *See* CONSTITUTIONAL LAW, 200.

FIRE.

Communication of.] *See* NEGLIGENCE, 721.

FOREIGN JUDGMENT.

See JUDGMENT, 646.

FORGERY.

See CRIMINAL LAW, 780.

FRAUD.

1. **Action by mortgagor to avoid mortgage fraudulently obtained — negligence.]** In an action by a mortgagor for equitable relief from a bond and mortgage which she had been fraudulently induced to execute, against a *bona fide* holder for value, the plaintiff must not only show that she was induced to execute the instruments by the false and fraudulent representations of such third party, but also that the execution was without negligence on her part, and this, although she was old, infirm and illiterate. *Montgomery v. Scott* (S. C.), 1.

FRAUD — *Continued.*

2. Constructive — minor and persons in loco parentis.] A conveyance by a minor, on the day he comes of age, of all his real estate to a person occupying the relations of parent and guardian of such minor, in execution of a settlement made for such minor by others not authorized to bind him, and while he is still under his influence and control, and not advised of his rights, is not binding, and can only be upheld in a court of equity by clear proof that under all the circumstances it is just and equitable and the burden is on the claimant to show the utmost good faith. *Berkmeyer v. Kellerman* (Ohio St.), 577.

On sale, who can object to.] See SALE, 514.

Rescission of contract for.] See CONTRACT, 433.

FRAUDULENT CONVEYANCE.

Of exempt property.] Property exempt from execution is not susceptible of fraudulent alienation. *Derby v. Weyrich* (Neb.), 827.

See EXEMPTION, 752, 827.

GIFT.

Causa mortis — savings bank deposit.] J. H., being in feeble health, made a deposit in a savings bank to the credit of himself and mother, and the survivor of them, subject to the order of either. He subsequently went to the bank accompanied by his sister, and had the name of the mother erased and that of the sister substituted, so that the account was to the credit of J. H. and his sister, "and the survivor of them, subject to the order of either." This money constituted nearly all his property. After this he drew out \$50. He kept possession of the bank-book until his death. After the deposit he made a will dividing his property among his relatives, to carry out the provisions of which would require the sum deposited. *Held*, that there was no gift *causa mortis* of the deposit, nor was there sufficient to establish a trust therein in favor of the sister. *Taylor v. Henry* (Md.), 486.

GOOD WILL.

See LANDLORD AND TENANT, 811.

GUARANTY.

Letter of credit.] A letter addressed to a lumber merchant in the following language: "Please send my son the lumber he asks for, and it will be all right," is a guaranty that the lumber sold and delivered to the son, at the time of its presentation, will be paid for. But such guaranty is not *continuing*, so as to make the guarantor liable for lumber subsequently purchased by the son from the same merchant. And payments afterward made by the principal on account will be applied in satisfaction of the first purchase, and consequent discharge of the grantor's liability. *Birdsell v. Heacock* (Ohio St.), 572.

GUARDIAN AND WARD.

Investment of ward's money in guardian's business — Liability of surety.]

The investment of the ward's money by the guardian in his own business or in the business of others in which he has an interest, as a mere business investment, is a conversion of such money for which he becomes immediately liable on his bond. *State ex rel. Cavins v. Sanders* (Ind.), 202.

HABEAS CORPUS.

See JUDGMENT, 20.

HOMICIDE.

Accidental.] *See* CRIMINAL LAW, 165.

HUSBAND AND WIFE.

See MARRIAGE.

IMPEACHMENT.

See TRIAL, 419.

INDORSEMENT.

Special.] *See* NEGOTIABLE INSTRUMENTS, 811.

INDORSER.

Waiver of protest.] *See* NEGOTIABLE INSTRUMENTS, 593.

INDICTMENT.

See CRIMINAL LAW, 146, 169, 647.

INFANCY.

1. As defense to executory contract.] In an action on a promissory note executed to trustees of a college, as a contribution to an endowment fund, and payable on the condition that a specified sum should be "secured" for that purpose to a given date, the defendant answered that a portion of the required sum was secured by promissory notes of infants, as the plaintiff knew, and which the plaintiff fraudulently accepted. *Held*, insufficient, such notes being voidable only, and not void. *Board of Trustees of LaGrange Collegiate Institute v. Anderson* (Ind.), 224.

2. How parents may confer right to custody of minor children.] Where the father and mother, living apart, by agreement transfer the care and custody of their infant children to the grandfather of the children, in consideration that he will receive, care and provide for them, and in pursuance of such agreement he does take them in charge, the custody of the grandfather is lawful, and he has legal capacity to maintain an action for damages against one who wrongfully takes or causes them to be taken from his custody, without showing actual loss of services. *Clark v. Beyer* (Ohio St.), 598.

INSURANCE.

1. **Deviation.]** A policy of insurance was issued on a cod-fishing vessel, for the voyage from Plymouth to Banks cod-fishing, and back. After arriving at the Banks, the vessel got out of bait and put in to St. Peter's, the nearest practicable port, for a supply. *Held*, in the absence of proof of usage, a fatal deviation. *Burgess v. Equitable Marine Insurance Company* (Mass.), 654.
2. **Stipulation that agent procuring insurance shall be deemed agent of insured.]** A stipulation in an insurance policy, that any other person than the insured, who may have procured the insurance to be taken, shall be deemed the agent of the insured, and not of the company, under all circumstances, in any transaction relating to the insurance, cannot apply to the agent who procured the application and made the contract professedly on behalf of the company, being charged with the duty of soliciting insurance, taking applications, collecting premiums, etc., by the company, which was authorized by its charter to appoint agents and define their powers. *Planters' Insurance Company v. Myers* (Miss.), 521.
3. **—.]** When an applicant for insurance makes correct answers to the questions asked him by the agent of the insurer, and the agent dictates or suggests the answers as set down, and such answers are incorrect, the fault will be attributed to the insurer, and parol evidence may be resorted to for the purpose of showing the circumstances attending the application. *Id.*

INSURANCE COMPANY.

Taxation of premiums.] See CONSTITUTIONAL LAW, 852.

INTEREST.

- After maturity.]** A contract to pay a sum certain at a future day, with interest at a conventional rate, nothing being said as to the rate of interest after the principal sum becomes due, bears interest at the conventional rate until it becomes due, and from that time, upon the aggregate of principal and interest at the legal rate. *Briggs v. Winsmith* (S. C.), 46.
- On legacies.]** See WILL, 315.

See NEGOTIABLE INSTRUMENTS.

INTOXICATING LIQUORS.

See CRIMINAL LAW, 614.

JUDGMENT.

1. **Foreign — collateral impeachment of.]** A judgment of another State, when sued upon here, may be impeached notwithstanding its recitals, by showing that there was no service of process nor authority for the appearance of the attorney. *Gilman v. Gilman* (Mass.), 646.
2. **Voidable or void — habeas corpus.]** Although a prisoner convicted of assault with intent to kill cannot lawfully be sentenced to confinement in

JUDGMENT — *Continued.*

the penitentiary at hard labor, such sentence is not void, but only voidable, and relief can be obtained only by appeal and not by *habeas corpus*. *Ex parte Bond* (S. C.), 20.

JURISDICTION.

Probate court — administration on estate of living person.] Proceedings in a probate court, administering, settling and assigning the estate of a person, who, though represented to be dead, is still living, are absolutely void ; and a claim of title to land thereunder, with entry and occupation for ten years, is no bar to an action to recover such land. *McClis v. Simmons* (Wis.), 746.

Alteration of boundary.] See CRIMINAL LAW, 142.

To recover usurious interest reserved by National banks.] See NATIONAL BANK, 343.

JURY.

Discharge of, before verdict.] See CRIMINAL LAW, 90.

See CRIMINAL LAW, 403, 782 : TRIAL, 496.

LACHES.

In presenting check.] See NEGOTIABLE INSTRUMENT, 712.

LANDLORD AND TENANT.

1. Forfeiture of lease — demand of rent.] Where a lease, conditioned to be forfeited for non-payment of rent, provides no place for payment, payment must be demanded by the landlord of the tenant, on the premises, just before sunset on the specified day. *Jenkins v. Jenkins* (Ind.), 229.

2. Service of notice to quit.] A statute, providing for notice to quit for non-payment of rent, required that it "be served on the tenant, or if he cannot be found, by delivering the same to some person of proper age and discretion, residing on the premises, having first made known to such person the contents thereof." *Held*, that this requirement was not answered by simply reading the notice to the tenant. *Id.*

3. Lease — good-will.] On a lease of an old bakery and the good-will of the business, the lessor vacated the premises and discontinued the business a week or two before the commencement of the term, and removed certain fixtures, and it required about a week for the lessee to replace the fixtures after taking possession. *Held*, in the absence of evidence that the value of the good-will was thereby injured, no ground of recovery. *Lewis v. Seabury* (N. Y.), 311.

4. — evidence, parol, as to fixtures.] In a written lease, silent as to fixtures, it was provided that the lessee should make all necessary "improvements and repairs." For an independent consideration, the lessor agreed that certain fixtures should remain for the lessee's use. An outgoing tenant removed them, and the lessor promised to replace them, but failing to do

LANDLORD AND TENANT — *Continued.*

so, the lessee replaced them at her own expense, and the lessor promised to make it right. *Held*, that parol evidence of the agreement about the fixtures was competent, and the lessee was entitled to recover the sum so expended. *Id.*

6. Responsibility for injury arising from premises becoming out of repair.] Upon leased premises, a water-pipe and gutter, not defective in their original construction, became stopped up, so that the water flowed upon the door steps of the leased house, forming ice, upon which a third person fell and was injured. As between lessor and lessee, in the absence of contract to the contrary, it is the duty of the latter to repair the pipe, or remove the ice, and for failure in this he is liable, and not the landlord. *Shindelbeck v. Moon* (Ohio St.), 584.

6. When assignor of lease may recover rent.] A lessee can recover rent from an assignee of the lease only when he himself has paid the rent to the lessor. *Farrington v. Kimball* (Mass.), 680.

Under Civil Damage Act.] *See* CONSTITUTIONAL LAW, 898.

See NEGLIGENCE, 695.

LARCENY.

Of estrays.] *See* CRIMINAL LAW, 214.

See CRIMINAL LAW, 157, 163, 785.

LEASE.

See LANDLORD AND TENANT, 229, 311, 690.

LEGACY.

Interest on.] *See* WILL, 815.

When vested.] *See* WILL, 861.

LETTER OF CREDIT.

See GUARANTY, 572.

LIBEL.

See SLANDER AND LIBEL.

LIEN.

Vendor's.] *See* VENDOR AND PURCHASER, 708.

LIEN.

See AGISTER, 425.

LOST PROPERTY.

Rights of finder.] The plaintiff, while engaged as an employee in the defendant's paper mill, in assorting a bale of old papers which the defendant

LOST PROPERTY — *Continued.*

had bought for manufacture, found a number of bank notes, in a clean unmarked envelope, in a bale, and delivered them to the defendant for the purpose of ascertaining if they were good, and upon his promise to return them. The defendant refusing to return them upon demand, *held*, that the plaintiff was entitled to recover their value from him. *Bowen v. Sullivan* (Ind.), 172.

LOTTERY.

"Playing policy."] The purchase of a number which, if drawn, will entitle the holder to a large sum of money is the purchase of an interest or share in a lottery, within the meaning of a statute. *Wilkinson v. Gill* (N. Y.), 264.

LUNATIC.

Deed of, when valid.] *See* DEED, 77.

MALPRACTICE.

See NEGLIGENCE, 642.

MANDAMUS.

For office — suit for, not triable after term of office has expired.] A suit for mandamus for an office will not be determined after the term of the office has expired. *Lacoste v. Duffy* (Tex.), 122.

See SCHOOLS, 706.

MANUFACTURER.

Taxation of, as trader.] *See* TAXATION, 94.

MARRIAGE.

1. *Evidence — presumption of — when overcome.*] The presumption of a marriage between A. and B., founded simply upon habit and repute, is overcome by proof of a subsequent actual marriage between A. and C. during the life-time of B. *Jones v. Jones* (Md.), 466.

2. *Action by wife to set aside ante-nuptial conveyance.*] In February, 1873, plaintiff was a widow, living in Indiana, and defendant a widower, living in Kansas. In correspondence with her with a view to marriage, defendant stated that he owned two good farms in Kansas and some personal property. In April, 1873, defendant, without any pecuniary consideration, conveyed the farms to his two minor children by his first wife, who were living with him, stating that he designed the conveyance as a provision for them in case his proposed marriage should not prove fortunate. In May, 1873, he visited Indiana, and the parties then became engaged, and were married in August, 1873. The deed was recorded August 13, 1873, and the plaintiff had no knowledge of it until long afterward. The defendant provided well for the support of the plaintiff, and no evidence was given of the amount of his property. *Held*, that a refusal to set aside such conveyance as fraudulent was proper. *Butler v. Butler* (Kana.), 441.

MARRIAGE — *Continued.*

3. **Contract of married woman to pay attorney's fees.]** A married woman may bind her separate estate by a contract for compensation of an attorney at law for his services in defending her interests in a legal proceeding in reference thereto or affecting the same, although the enabling statutes do not expressly authorize such employment. *Porter v. Haley* (Miss.), 502.
4. **Married women's separate business — farming.]** A married woman, owning and carrying on a farm for the support of her family or her husband's family, is engaged in a "business on her separate account," within the meaning of a statute, requiring her to file a certificate that personal property used in her separate business is owned by her, in order to exempt it from attachment against her husband. *Snow v. Sheldon* (Mass.), 684.
5. **— charge of separate property — when implied.]** When a married woman subscribes to capital stock of a railroad corporation, by which she agrees to take and pay for a certain number of shares of said stock, but makes default in payment, and action is brought to charge her separate property with the amount of such subscription, *held*, that in the absence of any proof that either party dealt on the credit of such property, equity will not imply or enforce a charge against the same. *Rice v. Railroad Co.* (Ohio St.), 610.
6. **Husband's right to wife's separate earnings.]** Although the statute authorizes a married woman to appropriate her earnings to her separate use, yet in the absence of evidence of an intention so to appropriate them, the husband is entitled to them. *Birkbeck v. Ackroyd* (N. Y.), 304.
7. **Crop raised by wife on husband's land.]** Although a wife is by statute, entitled to the fruits of her own labor, yet if she expends money and furnishes mules in the cultivation of crops on land leased by her husband, and mainly worked by himself and his two minor sons, the crops belong to him and are subject to his debts. *Hamilton v. Booth* (Miss.), 500.
8. **Divorce — adultery after separation.]** Under the statute allowing a divorce only to a party "injured," the adultery of the wife committed after a separation caused by default of the husband will not avail him to dissolve the bonds of matrimony. *Tew v. Tew* (N. C.), 84.
9. **Wife's necessities pending action for divorce — alimony.]** Where a wife is living separate and apart from her husband, and in a suit against him for divorce and alimony, has obtained a decree fixing the amount of alimony to be paid by the husband for her sustenance during the pendency of her petition, and the husband is not in default in respect to the payment of the alimony so allotted, he is not liable for necessities subsequently furnished at her request during the pendency of her petition. *Hare v. Gibson* (Ohio St.), 568.
10. **—.]** Persons dealing with the wife, under these circumstances, do so at their own peril, and are chargeable *with knowledge of the allotment and payment of the alimony.* *Id.*

MARRIAGE — *Continued.*

11. —.] The adequacy of the alimony decree in such case cannot be collaterally drawn in question, especially by a stranger to the suit. *Id.*
Subsequent to adultery.] See CRIMINAL LAW, 144.

MARRIED WOMAN.

See MARRIAGE, 500, 610, 684.

MASTER AND SERVANT.

1. Negligence — of fellow-servant.] The plaintiff, an employee of defendant, was injured while escaping from defendant's burning mill. The fire was caused by the heating of machinery, and might easily have been extinguished at first, but although there was a cistern with pipes and hose, the water would not run. *Held*, in the absence of other evidence, that this failure must be attributed to the negligence of the plaintiff's fellow-servants, either in care or operation, and she could not recover for the injury. In the absence of statutory requirements, the defendant was not bound to furnish means of escape from fires, not caused by its negligence. *Jones v. Granite Mills* (Mass.), 661.
2. — contractor.] The defendant's horse kicked a loose shoe through the plaintiff's window-glass. The horse was being driven by a person paid by the defendant, and by the latter let with a wagon by the day to a city in the work of paving streets. It was under the sole management of that person whose duty it was to keep it properly shod. *Held*, that the driver was at the time the servant of the defendant, and the defendant was liable for the injury. *Huff v. Ford* (Mass.), 645.
3. — duty of master as to safety of building.] In an action by the administrator of an employee injured in escaping from defendant's burning mill, the court charged that if the room where the plaintiff worked was suitable, and there were proper means of extinguishing fires, and the means of egress and escape were suitable and proper, and in order and ready for use, there could be no recovery, and refused to charge that it was the defendant's duty to provide means of giving alarm in case of fire. *Held*, no error. *Keith v. Granite Mills* (Mass.), 666.

MEMORANDUM.

Of sale.] See STATUTE OF FRAUDS, 388.

When part of note.] See NEGOTIABLE INSTRUMENT, 890.

MISCEGENATION.

See CONSTITUTIONAL LAW, 181.

MISTAKE.

Of law.] The plaintiff, proposing to buy of the defendant his interest in certain lands, was informed of all the facts affecting the title. An attorney acting for both parties, upon consideration of those facts, advised the

MISTAKE — *Continued.*

parties that the defendant had a certain interest in the lands. The plaintiff acting upon that advice purchased the supposed interest. This advice being incorrect, *held* that the mistake was one of law only, and the plaintiff could not recover the purchase-money. *Burkhauser v. Schmitt* (Wis.), 740.

MORTGAGE.

1. **Of crop to be planted.]** A contract in writing, dated in December, by which a debtor, in consideration of indulgence, gave to his creditor "a mortgage on all my [his] cotton, corn and wheat that I may raise during the then next year, to secure the payment of the debt; and in default of payment by the 1st of November next, then I authorize the said' creditor or his agent to "take all the crops raised by me." *Held*, a good and enforceable lien upon the crops mentioned therein, although they had not been planted when the contract was made, the mortgagee having taken the property into his possession after it is acquired and before the rights of others as creditors or purchasers have attached thereon. *Moore v. Byrum* (S. C.), 58, and note, 63.

2. **Recording purchase-money mortgage—priority.]** A purchaser of land on the same day gave a purchase-money mortgage to the vendor, and a mortgage to another, before the delivery of the deed, for money to make a cash payment on the purchase. Both mortgages were recorded on the same day, the latter first. *Held*, that the former had priority. *Turk v. Funk* (Mo), 771.

Action to avoid.] See FRAUD, 1.

MUNICIPAL CORPORATION.

1. **Cannot delegate its legislative powers.]** A city authorized by its charter to erect, repair and regulate public wharves, and to fix the rate of wharfage thereat, cannot lease its wharf, or farm out its revenues, or empower any one else to fix the rates of wharfage. *Matthews v. City of Alexandria* (Mo.), 776.

2. **Liability for abandonment of proposed improvement—agency.]** A municipal corporation resolved upon a public improvement, and appointed commissioners to condemn property. The commissioners notified the plaintiff that his property was required, and that he must prepare to vacate it as soon as possible. He thereupon commenced closing out his business, and thus did only about half his ordinary business for six months and none at all for a year after that. The improvement was then abandoned. No compensation was ever paid or tendered him. *Held*, that he could not maintain an action of damages against the corporation, for such voluntary and unnecessary acquiescence in a notification not within the powers of the commissioners. *Mayor v. Musgrave* (Md.), 458.

3. **Ordinance to compel removal of snow by citizens.]** A municipal ordinance requiring occupants and owners of premises to remove snow from the adjacent sidewalks is invalid. *Gridley v. City of Bloomington* (Ill.), 566.

MUNICIPAL CORPORATION — *Continued.*

4. **Right to remove street railway in construction of sewer.]** A municipal corporation, authorized to construct sewers, cannot be restrained from the removal of a horse railway from the street, if such removal is necessary for that purpose. *Kirby v. Citizens' Railway Co. (Md.)*, 455.
- Personal liability of officers.]** See OFFICE AND OFFICER, 508.

NATIONAL BANK.

1. **Jurisdiction of State courts in actions to recover illegal interest from.]** State courts have jurisdiction of actions to recover illegal interest reserved by National banks upon loans. *Blets v. Columbia National Bank (Penn. St.)*, 843.
2. **Usury — discounting business paper.]** A National bank, discounting business paper at a greater rate than seven per cent, is liable to the forfeiture of double the excess over seven per cent imposed by the National Banking Act, although the transaction is not usurious under the State law. *Johnson v. National Bank of Gloversville (N. Y.)*, 302.
- Taxation of stock.]** See CONSTITUTIONAL LAW, 75.

NECESSARIES.

See MARRIAGE, 568.

NEGLIGENCE.

1. **Action for, by trespasser on railway.]** Defendant's railway train ran over and injured a child four years of age, playing on its track. The place in question was a cutting through a ledge, near which the plaintiff lived with his mother. There were houses on both sides of the track upon the ledge and beyond it, and the cutting was unfenced at both ends. The cutting was 400 feet from any public street, but people were accustomed to pass through it. *Held*, that the plaintiff was a trespasser, and could not maintain an action for the injury, there being no evidence of malice or gross and reckless carelessness. *Morrissey v. Eastern Railroad Company (Mass.)*, 686.
2. **—.]** A person who, without right, with a full knowledge of the location, voluntarily places himself upon a railroad track, at a place where there is no crossing, and which is a known place of danger, and is killed by a passing train, is negligent, and no damages can be recovered for his death, except for wanton injury. *Pittsburgh v. Fort Wayne & Chicago Railway, etc., Co. v. Collins (Penn. St.)*, 871.
3. **Malpractice — midwife acting as oculist.]** The defendant was a midwife who attended the plaintiff's mother at the plaintiff's birth, and a disease of the plaintiff's eyes being called to her attention a few days after birth, she said it was not serious, that she could cure it and had cured others of a similar affection, and told the plaintiff's mother not to call in a physician, and, having prescribed some simple washes, the plaintiff became blind. It appeared that the disease was serious but curable, and that the

NEGLIGENCE — *Continued.*

remedies applied were improper. *Held*, that in the absence of evidence that the care of the child's eyes was part of a midwife's ordinary duties, it must be regarded as not embraced in the contract, and as gratuitous, and that no recovery could be had for damages. *Higgins v. McCabe* (Mass.), 642.

4. **Hackney coachmen — liability to gratuitous passenger.]** In the absence of express contract, a carrier of passengers by hackney coaches is liable for injuries resulting from his negligence to a gratuitous passenger. *Lemon v. Chanslor* (Mo.), 799.
5. **Landlord' and tenant—liability for injury to third person by condition of premises.]** The lessor of a building is not liable to one who in passing along a walk leading from the street to the building, for the purpose of transacting business with the tenant, is injured by falling down an unfenced adjoining embankment, although the premises were in that condition prior to the letting. *Mellen v. Morrill* (Mass.), 695.
6. **Dangerous animal in street.]** The plaintiff was injured by the defendant's bull while it was being led through a public street. The defendant was proved to have said after the accident that his servant was careless in his manner of leading the bull through the street. *Held*, that this evidence, together with the knowledge imputable to the defendant, of the dangerous nature of the animal in general, might be taken as an admission by the defendant that the bull needed to be controlled, and that the servant's care of it was negligent. *Linnehan v. Sampson* (Mass.), 692.
7. **Contributory.]** The plaintiff, while walking in a city street, heard cries for help, and on turning a corner saw a man on his back in the roadway, holding a bull by a rope attached to a ring in his nose, the bull attempting to gore him. The plaintiff went near the bull, but did not attempt to assist the man, and the bull rushed upon and gored the plaintiff. *Held*, that the plaintiff was not in this guilty of contributory negligence. *Id.*
8. **Contributory — communication of fire.]** In an action for injuries by fire to buildings adjacent to a railway, caused by negligent management or construction of the defendants' locomotives, it appeared that the plaintiff had suffered an accumulation of hay and shavings, between the buildings burned, and under one of them which was placed on blocks, with the side next the railway open. *Held*, that this was evidence of contributory negligence which should be submitted to the jury. *Murphy v. Chicago and North-western Railway Company* (Wis.), 721.
9. — **effect of, where negligence is willful.]** It is only where an injury is shown to have been willfully or purposely committed that contributory negligence ceases to be a defense. *Pennsylvania Company v. Sinclair* (Ind.), 185.
10. — **when not excused by the illegal nature of the producing cause.]** A person about to cross a street of a city in which there is an ordinance against fast driving has a right to presume, in the absence of

NEGLIGENCE — *Continued.*

knowledge to the contrary, that others will respect and conform to such ordinance. But where he knows that others are driving along the street, at the place of crossing, at a forbidden rate of speed, and he has full means of seeing the rate at which they are driving, the existence of such ordinance will not authorize a presumption which is negatived by the evidence of his senses. If the attempt to cross the street, under the circumstances, would be negligence on his part, the fact of the existence of such city ordinance is not evidence tending to free him from culpability. *Baker v. Pendergast* (Ohio St.), 620.

Of bank.] See SURETY, 374.

Contributory.] See FRAUD, 1 ; NUISANCE, 364.

See LANDLORD AND TENANT, 584 ; MASTER AND SERVANT, 645, 661, 666.

NEGOTIABLE INSTRUMENTS.

1. What constitutes bill of exchange.] A. and B., cultivating on shares the farm of C. and D., partners, gave E., a creditor of A. and B., an order to C. and D. to pay a sum of money to E. and "take the same out of our share of the grain," referring to grain raised by A. and B. on the farm in question. C. & D. wrote "order accepted" on the back of the instrument, and signed their firm name. *Held*, that the order was a valid bill of exchange, not payable out of a particular fund, nor conditional ; and that C. & D. could not defend on the ground, that before acceptance they had made advances to A. and B. on the faith of their share of the grain, to an amount larger than its value, as was known to E. at the time of acceptance. *Corbett v. Clark* (Wis.), 763.
2. What words destroy negotiability.] A promissory note is not rendered non-negotiable by the addition of these words : "The express condition of the sale and purchase of this Ohio reaper and mower No. — is such that the title, ownership, or possession does not pass from the said McDonald & Co. until the note and interest is paid in full. That the said McDonald & Co. have full power to declare this note due and take possession of said machine at any time they may deem themselves insecure, even before the maturity of the note." *Hearl v. Dubuque County Bank* (Neb.), 811.
3. Special indorsement.] The payee of a promissory note wrote his name on the back, under the following words : "For value received I hereby guarantee payment of the within note and waive presentation, protest and notice," signed by the payee. *Held*, that this operated as an indorsement with an enlarged liability. *Id.*
4. When memorandum a part of note.] On the back of a promissory note the following memorandum was written at the time of the execution of the note : "This note to be paid in wheat at ninety-five cents per bushel." *Held*, that the memorandum was a part of the note. *Polo Manufacturing Company v. Parr* (Neb.), 880.

NEGOTIABLE INSTRUMENTS — *Continued.*

5. **Acceptance, whether individual or official — evidence to show.]** A bill was drawn by a corporation, addressed to its treasurer as an individual and accepted by him with the addition of "treasurer," etc. *Held*, that parol evidence was admissible to show that his acceptance was designed only in his official capacity. *Laflin and Rand Powder Company v. Sinheimer* (Md.), 472.
6. **——.]** In a suit by payee against acceptor, the former is in the position of a *bona fide* indorser, and the consideration cannot be inquired into. *Id.*
7. **Duty of holder of, for antecedent debt.]** When a draft on a third person is given in settlement of an antecedent debt, it is the duty of the holder to present it, and to give notice of its dishonor if not paid, and a failure to do so will discharge the debt. *Mauney v. Coit* (N. C.), 80.
8. **Check — false description of drawee — laches in presenting.]** A., B. and C. resided in W. A. kept his bank account with D., a private banker there, who was known to B. and C., and with whom C. had sometimes done his banking business. A. gave to B. a check, good at the time, using a blank check upon the First National Bank of Milwaukee, erasing the words "First National," and writing above them the name of D., but neglecting to erase the words "Bank of Milwaukee." B., two days later, sold the check to C., who held it a week, and then D. failed, and it was never paid. *Held*, that no action could be maintained against A. upon the check. *Corr v. Bacon* (Wis.), 712.
9. **Bona fides — taking after interest due — suspicious circumstances.]** One who in good faith and for value purchases a promissory note before the principal is due, is within the protection of the law merchant, although interest is overdue and unpaid at the time of the purchase, and the note is indorsed by the payee without recourse, and there it appears to be "secured by real estate mortgage." *Kelley v. Whitney* (Wis.), 697.
10. **Payment of, before maturity — agent for receiving payment.]** Defendant executed his note to plaintiff payable in ten days at bank. He paid the amount to the bank two days after, but the note was not there. Three days later the plaintiff sent him printed notice of the time and place of payment, and that it was then in the bank, with a printed memorandum on the back, in three languages, that a like notice was sent to all the plaintiff's customers, that the note might be paid before maturity, with a deduction of interest, and that "the agent" who held the note for collection would allow it on production of the notice. Two days later still the bank received the note from the plaintiff, and the next day suspended payment and never paid the amount to the plaintiff. *Held*, that the payment by defendant was effectual, and the note could not be enforced against him. *Osborn v. Baird* (Wis.), 710.
11. **What conduct of indorser excuses omission of protest and notice.]** Such conduct on the part of an indorser toward the holder of negotiable paper, as is calculated to put a person of reasonable prudence off his

NEGOTIABLE INSTRUMENTS — *Continued.*

guard, or to induce him to omit demand or protest, or to give notice of dishonor, will dispense with the necessity of taking these steps. *Boyd v. Bank of Toledo* (Ohio), 624.

12. Power of settling partner after dissolution to waive protest.] Where a settling partner, after dissolution, gives a draft in payment of a partnership debt, he cannot waive protest so as to bind his former dormant copartner. *Id.*

13. Immaterial alteration.] A promissory note, for the purpose of raising money for a church of which they were trustees, was executed in the usual form by several individuals, with the general addition of the words "Trustees of the, etc., church." These latter words were erased without their consent. *Held*, an immaterial alteration, as the makers were individually liable upon the note in its original form. *Hayes - Matthews* (Ind.), 236.

NOTES.

Administration on estate of living person, 748

Attorney, rights of, as to client, 358.

Carrier, liability as warehouseman, 548.

Contract, illegal, enforcement between parties, 106.

Contract, by school district, *ultra vires*, 450.

Crime, decoying into commission of, 129.

Criminal law, intent in statutory crime, 617

Damages, liquidated or penalty, 28.

Exempt property, voluntary conveyance of, 757.

Forgery, municipal certificate of indebtedness *ultra vires*, 782.

Insurance, mistake of agent, 581.

Interest after maturity, 47.

Larceny, severance and asportation, 159.

Lost property, rights of finder, 180.

Mortgage of crop to be planted, 68.

Negligence, contributory, when defense, 190.

Negligence, trespasser, 687.

Negotiable instrument, *bona fide* holder, purchase after default in payment of interest, 701.

Partnership, sale of entire assets by one partner in payment of his individual debt, 534.

Polling jury, 497.

Taxation of farming lands in city, 547.

Sale, implied warranty, 641.

Sale, right to recover price of fraudulent, as to creditors, 517.

Sunday, right to recover for injury on, 417.

Surety, discharged by death of principal, 56.

NOTICE.

Of hearing on assessment.] *See* CONSTITUTIONAL LAW, 232.

To quit, service of.] *See* LANDLORD AND TENANT, 222.

See CORPORATION, 807.

NUISANCE.

Unfenced opening in sidewalk — contributory negligence.] The plaintiffs in walking along a sidewalk in the evening stepped into an opening in front of a cellar window, and was injured. The opening was about fifteen inches wide and three feet long, designed for light and ventilation, and of a usual character. The street was lighted and there was a light in the window over the opening. *Held*, that the opening was not in itself a nuisance, and that there was evidence of contributory negligence for the jury. *King v. Thompson* (Penn. St.), 364.

OBSCENITY.

See CRIMINAL LAW, 652.

OFFICE AND OFFICER.

Officer of municipal corporation — personal liability of, for passage of ordinance.] When the officers of a municipal corporation are vested with legislative powers, they are exempt from personal liability for the mistaken use of such powers if within their authority, and if they exceed their powers, their acts are void and consequently do not impose personal liability. *Jones v. Loving* (Miss.), 508.

Slander of officer after expiration of office.] *See* SLANDER AND LIBEL, 436.

Suit for office not triable after term has expired.] *See* MANDAMUS, 123.

ORDINANCE.

See MUNICIPAL CORPORATION, 566.

PARAPHERNALIA.

See CARRIER, 271.

PARDON.

Conditional — effect of.] The governor may annex to a pardon the condition that the recipient shall refrain from the use of intoxicating liquors as a beverage during the remainder of the term of sentence; that he shall use proper exertions for the support of his mother and sister; and that he shall not during the same time be convicted of any criminal offense in the State; and may provide that for a violation of either condition the recipient shall be liable to summary arrest upon the governor's warrant; and upon the breach of the first condition, may revoke the pardon and recommit the recipient. *Arthur v. Craig* (Iowa), 395.

PARENT AND CHILD.

Advancement — premiums for life insurance by father for daughter.] A father purchased and paid for a policy of insurance on his own life in the name of his daughter, and for her sole benefit, and paid the annual premiums until his death. *Held*, that the amount of the policy and of the annual premiums after its purchase were advancements. *Rickenbacker v. Zimmerman* (S. C.), 87.

Right to custody of minor child.] *See* INFANCY, 595.

PARTNERSHIP.

1. **Attachment of debt due to, at suit of creditor of individual partners.]** A debt due an existing partnership, whose affairs are unsettled, is not subject to attachment at the suit of a creditor of one of the partners. *People's Bank v. Shryock* (Md.), 476.
2. **Contract with one partner, when binding on firm.]** Several plaintiffs were commission merchants dealing in cattle. One of the plaintiffs, without the knowledge of his other partners, agreed with defendant, in the name of the firm, to advance money, with which the defendant was to purchase cattle to be sold by the plaintiffs on commission, the profits to be divided between the plaintiffs and defendant. Transactions under this agreement resulted in loss. No settlement or accounting having been had, *held*, that the plaintiff could not maintain an action upon an implied contract to pay commissions. *Frye v. Sanders* (Kans.), 421.
3. **Money borrowed by one partner and used by partnership — when not partnership debt.]** Where a partner borrows money on the credit of his individual note, which is signed also by a surety, such borrowing does not create a partnership debt, though the money be applied to partnership purposes; and the principal of such surety is the individual partner, with whom he joins in the execution of the note, and not the partners generally. *Peterson v. Roach* (Ohio St.), 607.
4. **Transfer by one partner of firm assets in payment of his individual debt.]** As against a general creditor of a solvent partnership, one of the firm with the consent of his copartners, may in good faith make an absolute transfer of the entire partnership assets in payment of his individual debt. *Schmidlapp v. Currie* (Miss.), 530.
5. **Power of settling partner after dissolution to waive protest.]** Where a settling partner, after dissolution, gives a draft in payment of a partnership debt, he cannot waive protest so as to bind his former dormant copartner. *Mouney v. Coit* (N. C.), 80.

PASSENGER.

See CARRIER, 601, 799.

PAYMENT.

Voluntary — when may be recovered back.] A lease provided that the lessee should keep the premises repaired, except in case of fire, and in case the premises should be rendered unfit for tenancy by fire there should be a just and proportionate abatement of the rent. The premises were rendered unfit for tenancy by fire, but the lessor demanding the rent the lessee paid it under protest. *Held*, that he could not recover it back. *Regan v. Baldwin* (Mass.), 689.

See NEGOTIABLE INSTRUMENT, 710.

POLYGAMY.

See CRIMINAL LAW, 647.

PEW.

Sale of.] *See* DEED, 208.

PRESENTMENT.

See NEGOTIABLE INSTRUMENT, 712.

PRESUMPTION.

Of marriage, when overcome.] *See* EVIDENCE, 408.

PRINCIPAL AND AGENT.

See AGENCY, 795.

PRINCIPAL AND SURETY.

See SURETY, 788.

PROTEST.

Waiver of.] *See* NEGOTIABLE INSTRUMENTS, 624.

PUNISHMENT.

Cruel and unusual.] *See* CONSTITUTIONAL LAW, 88.

RAILROAD.

Horse—right of city to remove from street for repair.] *See* MUNICIPAL CORPORATION, 455.

See CARRIER, 98, 116 ; CONSTITUTIONAL LAW, 108.

RAPE.

Indictment.] *See* CRIMINAL LAW, 169.

RATIFICATION.

Of church subscription.] *See* SUNDAY, 197.

REGISTRATION.

Mistake in.] *See* DEED, 250.

Of mortgage priority.] *See* MORTGAGE, 771.

RELIGIOUS WORSHIP.

Disturbing.] *See* CRIMINAL LAW, 126

REMOVAL OF CAUSE.

1. Corporation—affidavit.] A corporation of another State sued here may remove the cause into the Federal court, and its authorized agent may make the requisite affidavit. *Mig. v. Andes Insurance Company* (N. Y.) 200.

REMOVAL OF CAUSE — *Continued.*

2. Bond.] On petition for removal of a cause to the Federal court, the State court may determine whether the bond is "good and sufficient," but cannot arbitrarily reject one good in form; and technical objections to the affidavit must be taken when the affidavit is read below, or are deemed waived. *Id.*

RENT.

See DISTRESS FOR RENT, 876.

RESCISSION.

See CONTRACT, 438.

RESERVATION.

See DEED, 672.

REVOCATION.

Of will by subsequent birth.] *See* WILL, 671.

SALE.

1. Implied warranty.] On a sale of personal property, where the purchaser inspects for himself the specific goods sold, and there is no express warranty, and the seller is guilty of no fraud, and is not himself the manufacturer of the goods sold, the doctrine of *caveat emptor* applies, although the seller may suppose that the goods are bought for the purpose to which the purchaser applies them. *Hight v. Bacon* (Mass.), 639.
2. When title passes.] S. agreed in writing to buy of L. five bales of cotton weighing 480 pounds each, at 11 cents a pound. At the time the cotton was in bulk on L.'s premises, and he was to haul it to M.'s gin, and after it was ginned and packed, to haul the bales to Canton. He hauled a portion to the gin, and it was ginned and packed, but before it was hauled to Canton it was attached by a creditor of L. *Held*, that title had not passed to S. *Smith v. Sparkman* (Miss.), 537.
3. Who can object to fraud in.] In an action for the price of goods sold and delivered, the defendant cannot avoid payment on the ground that the sale was in fraud of the seller's creditors. *Gary v. Jacobson* (Miss.), 514.
- Of intoxicating liquors.] *See* CRIMINAL LAW, 614.

SCHOOLS.

Mandamus — to compel teacher of public school to reinstate expelled pupil.] In matters where the board of control of public schools have made no regulations for the government of the schools, the teachers stand *in loco parentis*, and have inherent power to suspend pupils, for cause, and mandamus will not lie to compel such a teacher to reinstate such a suspended pupil. *State ex rel. Burfee v. Burton* (Wis.), 706.

SCHOOL DISTRICT.

See CONTRACT, 447.

SEDUCTION.

Evidence.] See CRIMINAL LAW, 387.

Not accomplished by force.] See CRIMINAL LAW, 407.

See CRIMINAL LAW, 311.

SET-OFF.

Equitable right of—bank—customer's deposit.] In the absence of facts entitling it to equitable relief, a bank, in an action by the administrator of its deceased customer to recover a deposit due to the intestate in his life, cannot set off a claim against the deceased not due until after his death, the statute of set-off not permitting such a course. *Jordan v. National Shoe and Leather Bank* (N. Y.), 319.

SLANDER AND LIBEL.

1. **Action for words concerning official conduct brought after the plaintiff has left such office.]** The defendant published an article charging the plaintiff with corrupt and dishonest conduct in public office, and with having been forced to refund money unlawfully taken and to leave such office. *Held*, that such article is *prima facie* libellous, and the action is maintainable although the plaintiff has left the office. *Russell v. Anthony* (Kans.), 436.
2. **Charge of adultery—when actionable.]** Adultery not being corporally punishable, a false charge of adultery is not actionable without proof of special damage, and sickness produced by the charge is not such damage. *Shafer v. Ahalt* (Md.), 456.
3. **Charges against one as a politician—when actionable.]** A newspaper article, concerning the chairman of a political county committee, not a candidate for office, described him as an impudent impostor; charged him with writing an address for money out of a corruption fund; alleged that he was the recognized champion and professional defender of prostitutes and the lowest criminals, and that he followed his profession solely to make money, and moulded his opinions according to his client's ability to pay. *Held* libellous *per se*. *Barr v. Moore* (Penn. St.), 367.
4. **Evidence to show sense in which words were intended.]** In an action of slander, evidence is admissible to show that words apparently actionable in themselves were not used in an actionable sense. *Fawcett v. Clark* (Md.), 481.
5. **Words spoken of a magistrate—when slanderous.]** Falsely and maliciously calling a justice of the peace "a damned fool of a justice," is slanderous in itself. *Spiering v. Andras* (Wis.), 744.
6. **Unauthorized repetition of slander by third persons.]** One who utters a slander is not responsible for its voluntary and unjustifiable repetition by others, over whom he has no control, and without his authority or request. *Hastings v. Stetson* (Mass.), 683.

STATUTE.

1. Construction — "liability."] A provision in a city charter that "no action against the city on a contract, obligation, or liability, express or implied, shall be commenced except in one year after the cause of action shall have accrued," does not include actions for torts." *McGaffin v. City of Cohoes* (N. Y.), 807.

For stopping railroad trains a specified time at stations.] *See* CONSTITUTIONAL LAW, 166.

Regulating issue and sale of tickets by passenger carriers.] *See* CONSTITUTIONAL LAW, 238.

See CONSTITUTIONAL LAW, 545.

Construction — auctioneer's license — one selling his own goods at auction.] One who sells his own goods at auction is an auctioneer within the meaning of an ordinance requiring persons exercising the business of an auctioneer to be licensed. *City of Goshen v. Kern* (Ind.), 234.

STATUTE OF FRAUDS.

1. Memorandum of sale — letter to vendor's agent.] A letter written by an owner of real estate to his agent, and received by him, stating that he would sell a certain portion thereof at a certain price, is not an agreement under the statute of frauds, although the agent communicates its contents to a proposed purchaser, who orally agrees to purchase upon the specified terms. *Steel v. Fife* (Iowa), 388.

2. — signing of — note for lands.] Defendant executed to plaintiff a negotiable instrument, which stated that the consideration was land sold him by plaintiff. In a suit upon that instrument, *held*, (1) that the suit was on the note and not on the contract of sale of the land; (2) that as a memorandum of the sale it did not need to be signed by the vendor; (3) that it was enforceable as a note, although it might not be a sufficient memorandum under the statute of frauds. *Crutchfield v. Donathon* (Tex.), 112.

See CONTRACT, 206.

Law of place — delivery to carrier.] An agent of a principal residing in Ohio contracted with a person residing in Indiana, to sell him goods exceeding \$50 in price. Nothing was said as to the manner of shipment. There was no memorandum, earnest money, nor payment, and the vendee did not receive any part of the goods. The principal afterward in Ohio, without the knowledge or assent of the vendee, shipped a part of the goods to the vendee, who refused to receive them. *Held*, that the contract was an Indiana contract; that it was an entire contract, and the vendee was not bound to accept part; that the delivery to the carrier, under the circumstances, was not a legal delivery to the vendee; and that the contract was void under the statute of frauds. *Heusman v. Nye* (Ind.), 199.

STATUTE OF LIMITATIONS.

1. **Conversion.]** The statute of limitations will not bar an action for conversion, in the absence of knowledge by the owner of such conversion, until a reasonable time elapses for learning the facts. *Houston, etc., Ry. Co. v. Adams* (Tex.), 116.
2. **When may be pleaded in bar in foreign jurisdiction.]** A statute of limitations of the place of contract, under which the bar is there complete, can be pleaded in bar of an action on the contract in a foreign jurisdiction, if the statute has extinguished the right of action; but otherwise if it goes only to the extinction of the remedy. *Perkins v. Guy* (Miss.), 516.

STOCK.

Rights of corporation as to transfer of.] See CORPORATION, 393.

SUBSCRIPTION.

To joint stock.] See CONTRACT, 349.

SUNDAY.

1. **Action for damages for injury sustained on.]** While the plaintiff was driving on a business errand on Sunday, the defendant's dogs barked at and frightened his horse, thereby causing an injury to the plaintiff. *Held*, that the plaintiff could recover damages therefor, although a statute prohibited labor on Sunday. *Schmid v. Humphrey* (Iowa), 414.
2. **Church subscription — ratification.]** A [church subscription made on Sunday is void, and is not made valid by a subsequent oral acknowledgment and promise to pay it, without consideration. *Catlett v. Trustees of the M. E. Church of Swoester Station* (Ind.), 197.

SURETY.

1. **Estate of, not discharged by his death before principal.]** Where a joint note is executed by a principal, and by a surety not otherwise liable, and the latter dies leaving the principal surviving, his estate is not discharged from the obligation. *Susong v. Vaiden* (S. C.), 50.
2. **On bond of bank messenger breach for stealing moneys from safe — negligence of obligee.]** The bond of a bank messenger bound him to "account for and pay over all moneys that may come into or pass through his hands as such messenger, and that he shall in all things conduct himself honestly and faithfully as such messenger." The bank intrusted him with the keys of the vault and the combination of the safe. He stole moneys of the bank from the safe and vault by means of the keys and his knowledge of the combination. *Held*, that the sureties on the bond were liable therefor. *German American Bank v. Auth* (Penn. St.), 374.

SURETY — Continued.

2. On collector's bond — extension of principal's time to pay.] A statutory extension of the time of a collector of taxes to pay over his collection operates to discharge the sureties on his bond previously given. *State ex use of Carroll County v. Roberts* (Mo.), 788.

Of guardian.] See GUARDIAN AND WARD, 208.

When cannot plead usury.] See USURY, 885.

TAXATION.

Trader — manufacturer.] A trader is one who sells goods substantially in the form in which they are bought, and who has not converted them into another form of property by his skill and labor; therefore, one who carries on the business of buying timber and converting it into lumber for sale is a manufacturer, and not liable to indictment for failure to pay a tax and obtain a license as a "trader." *State v. Chadbourn* (N. C.), 94.

Of dogs.] See CONSTITUTIONAL LAW, 152.

Of farming lands in city.] See CONSTITUTIONAL LAW, 542.

Of insurance premiums.] See CONSTITUTIONAL LAW, 852.

Of National bank stock.] See CONSTITUTIONAL LAW, 73.

Uniformity.] See CONSTITUTIONAL LAW, 182.

TRADER.

Taxation of manufacturer as.] See TAXATION, 94.

TRESPASS.

For personal injury — threats as a justification — evidence of character.] The defendant, armed and sitting in the road, saw the plaintiff coming toward him with a gun on his shoulder, and thereupon concealed himself and shot the plaintiff, although the latter made no hostile demonstrations and the defendant could easily have got away. The defendant knew that the plaintiff twenty days before had threatened to take his life, but there had been no attempt to carry out such threats. *Held*, (1) that the threats did not justify the defendant's action; (2) that evidence of the violent and dangerous character of the plaintiff, and of the peaceable character of the defendant, was incompetent. *Cummins v. Crawford* (Ill.), 558.

On public road.] See CRIMINAL LAW, 86.

See DAMAGES, 629.

TRESPASSER.

Action by, for negligence.] See NEGLIGENCE, 686.

See NEGLIGENCE, 871.

TRIAL.

1. Defeating right of party to testify by limiting number of witnesses.] When a party is by law a competent witness in his own suit, his right to

TRIAL — Continued.

testify cannot be defeated by limiting the number of witnesses. *Fisher v. Conway* (Kans.), 419.

2. **Impeachment — matters arising since action.]** The testimony of an impeaching witness will not be excluded solely because his knowledge has been acquired and is exclusively founded upon matters arising since the commencement of the action. *Id.*

3. **Right to poll jury — separation.]** The refusal of the court to poll the jury is error for which a judgment will be reversed. *James v. State* (Miss.), 496.

4. **Separation.]** The jury returned their written verdict to the clerk, during a recess, without consent of the parties. They then separated for half an hour, discussing the verdict with many meanwhile. Being recalled by the court, and asked if they had agreed, they answered that they had, and they then handed the verdict to the court. *Held*, no error. *Id.*

See CRIMINAL LAW, 148.

TRUST.

See GIFT, 486.

USURY.

Surety — when cannot plead.] A surety who has given his own note in part payment of his principal's usurious note cannot plead usury in an action upon his own note. *Osloer v. Wilbern* (Iowa), 885.

See NATIONAL BANK, 802, 848.

VENDOR AND PURCHASER.

Vendor's lien — taking check and withdrawal of funds.] On a purchase of land the vendee gave his bank check for the amount of a cash payment. The check was not presented until four weeks afterward, and there were no funds to pay it, the vendee having withdrawn them two weeks previously. *Held*, that the vendor's lien was not lost. *Madden v. Barnes* (Wis.), 708.

VERDICT.

See CRIMINAL LAW, 408.

VOLUNTARY CONVEYANCE.

Of exempt property.] *See EXEMPTION, 752.*

WARRANTY.

Implied.] *See SALE, 689.*

WASTE.

Subsequent alienation of premises.] An action for waste is not defeated by the transfer of the premises pending the action by the plaintiff to the defendant. *Dickinson v. Mayor* (Md.), 492.

WIDOW.

Not "legal heir."] See CONTRACT, 554.

WILL.

1. Action to correct—evidence—extrinsic in construing will.] A complaint alleged that a testator, at the time of making his will, and thereafter until his death, owned lot 10 in a certain block; that the plaintiff at those times ever since owned, in fee simple, lot 9 in the same block; that by said will the testator devised said lot 10 to plaintiff; but that in drawing the will, lot 10 was by mistake described as lot 9; that the will contained *no other mention or description of said lot 10*; and that at the time of the making of said will plaintiff was, and ever since has been, in the actual possession of said lot 10. *Held*, on demurrer, that there was nothing in the will, as thus described, upon which to base a construction of it as devising lot 10 to plaintiff. *Sherwood v. Sherwood* (Wis.), 757.
2. Parol evidence to explain ambiguity.] A will described one boundary of a tract of land devised, in terms in fact applicable to two different lines. *Held*, that parol evidence of the testator's intent, in including his declarations at the time of execution, was admissible to identify the boundary. *Morgan v. Burrows* (Wis.), 717.
3. Lost—probate upon—parol evidence of.] If a testator dies leaving an unrevoked will, which cannot be found after his death, parol evidence is competent to prove its contents, and as thus proved it may be admitted to probate. *Foster's Appeal* (Penn. St.), 340.
4. When deemed revoked by subsequent birth.] A statute provided that children of a testator, when born subsequently to the making of the will, and not provided for therein, should take as if there were no will, unless the omission to provide was intentional, and not occasioned by accident or mistake. A testatrix by ante-nuptial agreement had reserved to her sole use certain real estate and the right to dispose of it by will. Nine months after marriage she willed all her estate to her husband, making no provision for her children subsequently to be born. One month later she bore a child. *Held*, that the evidence justified a finding that the omission was intentional and not occasioned by mistake or accident. *Peters v. Siders* (Mass.), 671.
5. Legacy—when vested.] A testator devised real estate to his son, providing that if the son should die without legitimate issue, the land should be sold, and the proceeds should be equally divided among his grandchildren, born or to be born. Some of the grandchildren having died before the son, *held*, that their representatives were entitled to take their shares on the distribution. *Chess's Appeal* (Penn. St.), 361.
6. Devise for life—implied power to sell.] A devise for life is not enlarged to a fee by a subsequent implied power to sell. *Reanders v. Koppelman* (Mo.), 803.
7. Rule as to interest upon legacies—when controlled by circumstances.] A will gave twenty-one legacies, and directed that if testatrix's estate

WILL — *Continued.*

should be insufficient to pay all, the first fifteen should be first paid, and the balance applied *pro rata* to the rest. The only estate of the testatrix was a residuary interest in property subject to a life estate. The life tenant survived the testatrix, and when she died, the first fifteen legacies with interest from a year from the death of the testator amounted to more than the whole residuary estate. *Held*, that the legacies drew interest only from the death of the life tenant. *Wheeler v. Rutheon* (N. Y.), 815.

WORDS.

- "Auctioneer."] *See* STATUTE, 284.
- "Legal heirs."] *See* CONTRACT, 554.
- "Liability."] *See* STATUTE, 307.
- "Naked."] *See* CRIMINAL LAW, 652.
- "Necessary appendages."] *See* CONTRACT, 447.
- "Playing policy."] *See* LOTTERY, 264.
- "Trader."] *See* TAXATION, 94.

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